



**Oduor v Kalvinder Singh Bhullar t/a Bhullar & Company Advocates (Employment and Labour Relations Petition E172 of 2023) [2024] KEELRC 847 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 847 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E172 OF 2023**

**AN MWAURE, J**

**APRIL 12, 2024**

**BETWEEN**

**WILKISTER ODUOR ..... PETITIONER**

**AND**

**KALVINDER SINGH BHULLAR T/A BHULLAR & COMPANY  
ADVOCATES ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner filed a Petition dated 25<sup>th</sup> August 2023.

**Petitioner's Case**

2. The Petitioner avers that she was employed by the Respondent from February 2023, earning a monthly gross salary of Kshs. 55,943.
3. The Petitioner avers that on 3<sup>rd</sup> and 6<sup>th</sup> February 2023, she was interviewed by the Respondent where she was asked if she is married and if she has plans of having children to which she responded she is legally married and is expecting a child soon.
4. The Petitioner avers that she was asked to commence employment on 10.02.2023 although the Respondent remarked that he has issues with ladies in her offices who proceed for maternity leave and expect to be paid while he doesn't see the essence of paying people on maternity leave.
5. The Petitioner avers that the terms of her engagement were reduced to writing and was subjected to 3 months' probation from 01.03.2023.



6. The Petitioner avers that her expected date of delivery was 06.06.2023 and she notified her employer on 29.04.2023 and the Respondent coerced her to taking an unpaid maternity leave failing which her employment will be terminated, she chose the latter.
7. The Petitioner avers that she completed her 3 months' probation on 31.05.2023 and commenced her maternity leave on 01.06.2023. She signed a formal note whereupon she was expected to resume her duties on 1/9/2023, she handed over her duties to an Advocate deployed for holding over during the period she was on maternity leave.
8. The Petitioner avers that the Respondent called her on 04.08.2023 informing her not to report to work as earlier agreed without giving any justification. On 10.08.2023, the Respondent served her with an electronic mail of dismissal which stated:

“during the probationary period, and at the point where your engagement with the firm was to be discussed, you informed the undersigned that you were pregnant and scheduled to proceed on maternity leave. Understanding the psychological circumstances involved in the last month of pregnancy, we were not able to have this discussion on your non-confirmation of employment as evidenced by the non-payment of salary for the period immediately preceding this letter.”
9. The Petitioner avers that she discharged her duties as per the law and to the satisfaction of the Respondent without complaint as evidenced by the letter signed in acknowledgment of her resuming duty on 01.09.2023.
10. The Petitioner avers that she was dismissed from employment in account of her pregnancy.
11. The Petitioner avers that the Respondent's unilateral decision to dismiss her amounts to unfair labour practices and breach of her legitimate expectation as:
  - i. She was not issued with a notice to show cause why her employment should be terminated.
  - ii. She was denied a procedurally just and fair termination process contrary to section 41 of the [Employment Act](#)
  - iii. The Respondent never gave any reason for termination of her employment or justify its position in his response dated 22.08.2023 thus the process lacked substantive justification.
  - iv. Her termination was on account of her pregnancy.
12. The Petitioner avers that she was subjected to inhuman treatment and grievous economic turmoil by coercing her to go on unpaid maternity leave coupled with unlawful termination of her employment when she needed her employment most.

### **Respondent's Case**

13. In opposition to the Petition, the Respondent filed its Response dated 18<sup>th</sup> September 2023.
14. The Respondent avers that the Petitioner accepted the letter of offer dated 01.03.2023 where she was engaged as a legal assistant for a probationary period of 3 months after which she failed to satisfy the Respondent to renew her contract, hence the contract expired.
15. The Respondent avers that a contractual probationary period is provided in law as employees are not recruited at face value, every employer requires a period to uncover if the employee is fit for the job and capable of a productive employer-employee relationship.



16. The Respondent avers that at no point was the Petitioner's employment meant to be automatic by the lapse of the probationary contract. It was expressly stated in her contract that:

“...you will be on a probation for 3 months after which we will assess your work and if found to be satisfactory, we shall confirm your appointment.”

This was confirmed by the Petitioner's own supporting documents.
17. The Respondent avers that it has always strived to treat his employees with fairness and dignity having female employees allowed to proceed on maternity leave with no risk of loss of employment.
18. The Respondent avers that the Petitioner has failed to prove that she was subjected to unfair labour practices. The Respondent commenced internal process that gave the Petitioner leeway to engage him on a discussion on factors that led to her non-confirmation. However, in disregard of this option, the Petitioner served the Respondent with a demand letter with unsupported facts.
19. The Respondent avers that the Petitioner contributed to her non-confirmation by refusing and/or neglecting to participate in an internal process.
20. The Respondent avers that the Petitioner has not proved on a balance of probabilities her employment was terminated on grounds of pregnancy

### **Petitioner's Submissions**

21. It was submitted for the Petitioner that the Petition is premised on Article 27 of *the Constitution* which provides that every person is equal before the law and has the right to equal benefits. The Respondent treated the Petitioner differently when she was due for her maternity leave by subjecting her to take an unpaid maternity leave and subsequently terminated her services while she was on maternity leave.
22. The Petitioner submitted that she was indirectly terminated on 1.06.2023 on account of pregnancy and denied her right to proceed for a paid statutory maternity leave. The Respondent's conduct is discriminatory, unfair and unlawful.
23. The Petitioner submitted that the Respondent's decision to terminate her employment while on maternity leave was procedurally unfair and unjustified as due process of the law was not followed. She relied on *Walter Ogal Anuro v Teachers Service Commission [2013] eKLR*.
24. The Petitioner submitted that during the subsistence of her employment, she performed her duties diligently and to the Respondent's satisfaction as no show cause letter, disciplinary proceedings or performance improvement plan had been issued to her at any time during her probation. Therefore, her services were prematurely terminated without justifiable cause or notice cause contrary to Section 40 (1) (b) of the *Employment Act*, the termination was both unfair and unlawful.
25. The Petitioner submitted that the Respondent's act of terminating a probationary engagement way after the stipulated timeline was not only overtaken by events but the Respondent had carefully crafted how he will engage the services of the Petitioner on a short time basis given that she was pregnant at the time of her employment as he buys time to seek another Legal Assistant who happens to be the Advocate that was employed to take over from the Petitioner while she proceeded for maternity leave whom the Petitioner was told she was going to act as a reliever.
26. The Petitioner submitted that the Respondent cannot claim non-satisfactory performance as a reason for termination of the Petitioner's employment, if these issues were not raised with the Petitioner



during her tenure of probation. Hence, the Respondent neither exercised fair procedure as he did not give a valid reason for terminating the Petitioner's employment.

27. It is the Petitioner's submission that she was not on probation as of 10.08.2023. As per the Employment Contract, the probationary period was for 3 months from 1.03.2023 to 1.06.2023 upon which employment could continue subject to the terms and conditions of employment as a fixed term.
28. The Petitioner submitted that upon lapse of probation period, the Respondent did not issue her any notice of extension of the probation period. She then proceeded for maternity leave and was to report back on 1.09.2023; this signifies that she successfully completed her probation period and was a fully-fledged member of staff. The Respondent cannot discontinue a probation engagement way after the Petitioner completed the same.

### **Respondent's Submissions**

29. The Respondent submitted that the Petitioner has not proven that she was discriminated on account of sex or pregnancy. The Petitioner confirmed that she disclosed during her interview that she was married and expecting a child, hence the Respondent was aware of her pregnancy at the point of her engagement. This did not stop him from engaging hence, therefore, the Respondent had no issue with the Petitioner being female, pregnant and in need of maternity leave in the course of her employment.
30. The Respondent submitted that he was entitled by law to recruit the Petitioner on probationary basis and assess and evaluate her suitability during this period. Unfortunately, due to circumstances beyond his control, he could not exercise this right immediately before or at the end of the probation period on 01.06.2023; due to the delicate status of the Petitioner who was to deliver soon thereafter.
31. The Respondent submitted that the Petitioner vide an application for maternal leave dated 29.04.2023, notified the Respondent she was to deliver in a month's time and proposed to return to work on 01.09.2023. The Respondent had no choice but to acknowledge receipt of the application, however, he never confirmed the proposal to return on 01.09.2023 as the proposal was made prior to the lapse of the probation period.
32. It is the Respondents' submission that guided by pure conscience and as a reasonable man, the Respondent thought it inhumane, insensitive and careless to discuss the Petitioner's performance and deliver the news of non-confirmation when she was heavily pregnant as the news had possibility of causing substantial harm to her health. Therefore, he postponed the discussion till the child was delivered, the intention was not to discriminate but offer her sufficient time to recuperate before communicating her non-employment.
33. The Respondent submitted that when the Petitioner applied for leave, she had not completed her probationary period, and by the time she was concluding her probation on 01.06.2023, she was on her last day of pregnancy. Therefore, the circumstances at the end of her probation was not suitable for serious and disheartening discussion as non-confirmation of employment.
34. It is the Respondents submission that the Petitioner proceeded on maternity leave on her last of probation with the understanding that her employment had not been confirmed and the terms proposed in her application on 29.04.2023 had not been confirmed and accepted by the Respondent.
35. The Respondent submitted that he offered to provide reasons of non-confirmation within 7 days from the date of receipt of the letter of non-confirmation but the Petitioner declined the invite. Having declined, the Petitioner cannot be heard to say her non-performance during the probation period is allegation post facto after filing her petition and neither can she legitimately argue she was never granted



any reasons for non-confirmation when she elected not to attend the meeting whose agenda was to discuss the reasons of her non-confirmation.

36. It is the Respondent's submission that the Petitioner failed to discharge the burden of proof that she was engaged for a short time as the Respondent looked for her replacement. This is unfounded and untrue.
37. The Respondent submitted that there was no violation of section 41 to 46 of the *Employment Act* as he had legitimate reasons not conveying the non-confirmation within the probationary period. Further, the Petitioner declined the invitation to discuss the reasons of her non-confirmation. The notice of non-confirmation was to take effect after 7 days that is why the Petitioner was granted 7 days for discussion, therefore, the imputation that the non-confirmation was unfair is far-fetched.
38. The Respondent submitted that an employee cannot seek to be awarded compensation for unfair termination and general damages under common law as compensation covers economic injury.
39. It is the Respondent's submission that where the court finds the Respondent was discriminative and subjected the Petitioner to unfair labour practices, compensation ought not to issue under individual heads but must be considered together forming part and parcel of the same violation. Further, the Petitioner only worked for a period of 3 months and therefore is not deserving of Kshs 3,000,000 sought as discrimination.
40. The Respondent submitted that the Petitioner is not entitled to 1 month pay in lieu of notice as the terms of engagement were governed by the *Employment Act*. Section 42 of the *Employment Act* provides that a party to a probationary contract can give notice of 7 days which was rightfully issued. The probation period was never extended and the Petitioner was not an employer deserving of the notice.
41. It is the Respondent's submission that the Petitioner is not entitled to salary for the period if maternity as she accepted to proceed on unpaid leave with the knowledge that her employment had not been confirmed.

### **Analysis and Determination**

42. Having considered the parties' pleadings, written submissions and case law in support of their respective cases, the issues for this court's determination are:
  - a. Whether the employment contract was probationary.
  - b. Whether the Petitioner was terminated on account of pregnancy.
  - c. Whether Petitioner is entitled to the reliefs sought.

### **Whether the employment contract was probationary.**

43. It is not in dispute that the Petitioner was engaged by the Respondent vide an employment contract dated 01.03.2023 which provided that she will be on 3 months' probation after which the Respondent would assess her work and if found satisfactory, he shall confirm her appointment.
44. The probation period therefore lapsed on 01.06.2023, the Respondent did not communicate whether the Petitioner herein was confirmed or the said probation period was extended. She applied for maternity leave on 29<sup>th</sup> April 2023 from 1<sup>st</sup> June 2023 to 1<sup>st</sup> September 2023 and confirmed she will be on unpaid leave.



45. At that particular point the respondent did not respond to confirm if the petitioner was confirmed in her employment or not. It seems the petitioner agreed not to be paid during her maternity leave rather than be terminated.

46. By the time she received her termination letter on 10<sup>th</sup> August 2023 her probation period had already expired and the respondent had not communicated whether to confirm her contract.

47. Section 42(2) of the [employment act](#) provides:

“A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.”

In this case the probationary period extended by two months even if the petitioner was on unpaid maternity leave. There is no evidence that she was consulted for extension of the probationary period and so the court must find the petitioner’s contract had been confirmed.

48. To extend the probationary period is mandatory that both parties are in agreement. In the case of James Oloo vs Tama and Athi River development Authority (2016) eKLR the court held;

“the section is coached in mandatory terms in respect to the probationary period. In this case of the claimant then this probation period to be extended then it would have been done in agreement with the claimant.”

49. Similarly in this instant case the petitioner went on unpaid maternity leave and she then received a termination letter on grounds of poor performance.

50. Contrary to section 45(1) of the [Employment Act](#) which states as follows:

No employer shall terminate the employment of an employee unfairly.”

The respondent did not give a valid reason for terminating the petitioner’s contract. The termination letter merely stated that it was in the company’s best interest that the probationary engagement be terminated and she was given 7 days’ notice. As already held by the court the petitioner’s probationary period had already expired by 1<sup>st</sup> June 2023.

51 The respondent was obliged to give the petitioner an opportunity to be heard in the presence of a witness of her choice as provided in section 41(1) of the [Employment Act](#) which states as hereunder:

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.

52. In the respondent’s response the respondent stated the petitioners failed to satisfy the respondent. This is a mere averment and there is no evidence of how she performed poorly and how the respondent followed the process provided in terminating an employee for poor performance. In the case of Jane Wairimu Machira vs Mugo Waweru & Associates (2012) eKLR in which the court held that:

” the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In the Kenya science case, the court held that 2-3 months is a reasonable period for an employee to improve. In addition, the court in the instant case also held that an appraisal of the performance



of an employee must of necessity involve active participation of the employee and that a credible performance appraisal process must be evidently participatory.

52. Considering the pleadings and submissions and authorities hereto the court holds that the petitioners probationary period had expired and she is entitled to compensation just like any other term employee. The court further holds that the petitioner was terminated un procedurally and unfairly since she proceeded on maternity leave and just received a termination letter with no further explanation.
52. The court sees no other reasons for terminating the claimant from employment except that she was on maternity leave and that constitutes discrimination under article 27 of *the constitution* of Kenya 2010.
52. The claimant having been unlawfully terminated is awarded the following:-
- a. General damages for discrimination at kshs 200,000.
  - b. She worked for the respondent for about 3 months she is compensated 2 months equivalent of her salary as per section 49(1)(c) of *Employment Act* Kshs 111,886/-.
  - c. The prayer for 3 months maternity leave pay is declined as she conceded to the same and agreed to forgo her salary during the 3 months.
  - d. One month salary in lieu of notice is granted kshs 55,943/-.
  - e. Costs are awarded to the petitioner and interest of total award of kshs 367,829/- at court rates from date of this judgment till full payment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

