



**Were v Krishna Chemists (Cause E500 of 2023)
[2024] KEELRC 1645 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1645 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E500 OF 2023
NZIOKI WA MAKAU, J
JUNE 25, 2024**

BETWEEN

IMMACULATE WERE CLAIMANT

AND

KRISHNA CHEMISTS RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent through a Statement of Claim dated 22nd June 2023. She averred that the Respondent employed her as a Medical Representative on 1st February 2021 and issued her with an Employment Contract that was to lapse on 31st January 2023. She asserted that her starting salary was Kshs. 45,000/- and that from June 2021, the Respondent started paying her a Mileage Allowance of Kshs. 34,880/- and which amount varied per month ranging between Kshs. 34,880/- to Kshs. 77,380/-. In addition, the Claimant averred that she received a basic pay increment in December 2022 from Kshs. 45,000/- to Kshs. 77,613/- and that as at March 2023, she received a gross salary of Kshs. 144,118/- being basic pay of Kshs. 77,613/- and Mileage Allowance of Kshs. 66,505/-.
2. According to the Claimant, she diligently worked for the Respondent for over two years until 11th April 2023 when the Respondent notified her of termination of her employment and asked her to collect her termination letter. That however when she subsequently availed herself on 14th April 2023 to collect the termination letter, the Respondent issued her with a letter dated 1st April 2023 indicating that her employment had terminated because of lapse of her contract on 31st January 2023. The Claimant stated that she declined to take and sign the letter despite the Respondent coercing her to take it together with a cheque of Kshs. 60,000/-, as the same indicated that her acceptance amounted to a waiver of her rights for any further claim against the Respondent. She averred that the Respondent did not decline renewal of her contract on or before the 31st of January 2023 but instead continued accepting her employment beyond the set date for the lapse of the contract.



3. The Claimant's case was that the main reasons the Respondent terminated her employment was because of her pregnancy status that was physically noticeable and obvious as she was three (3) months pregnant and further, she had disclosed the same to the Respondent's Dr. Apurva Shah before her contract was terminated. She noted that subsequent to the Respondent noticing that she was pregnant, it advanced malicious notices in indicating that she was underperforming and further told her to immediately resign and be given a send-off package, or face termination. She averred that when she declined to resign, the Respondent consequently terminated her from employment without subjecting her to any disciplinary hearing or allowing her to defend herself in relation to her purported poor performance in sales. It was the Claimant's averment that the Respondent therefore discriminated her based on her pregnancy status contrary to the law. That the Respondent has also refused and neglected to compensate her for the unfair termination, pay her lawful dues and issue her with a certificate of service. The Claimant further asserted that due to the unfair termination of her employment, she is unable to service her car loan secured from a Sacco to enable her perform the Respondent's work in relation to going to the field, looking for customers and selling its pharmaceutical products. The Claimant thus prays for Judgment against the Respondent for a declaration that she was unfairly terminated from employment, 12 months' salary compensation for the unfair termination, one month's salary in lieu of notice, house allowance, damages for discrimination based in her pregnancy status, damages for her inability to service her loan, Certificate of Service, interest at court rates, and cost of the suit.

Respondent's Case

4. In its Statement of Defence dated 30th October 2023, the Respondent admitted that the Company was not in a position to renew the Claimant's contract upon its expiry on 31st January 2023 and as such, the Termination Letter dated 1st April 2023 and the Cheque of Kshs. 60,000/- was to serve as payment in lieu of notice. It contended that the Claimant refused to present herself to collect her final dues as instructed and continues to possess Company's property. That similarly, the Claimant had not obtained clearance across all departments to enable issuance of a certificate of service to her.
5. The Respondent averred that the Claimant had received an email noting her underperformance, which amounts to a misconduct as per the Company Rules and is a valid ground for dismissal. It argued that the said warning came before the Claimant's alleged disclosure of her pregnancy thus refuting the allegations of having discriminated her based on her pregnancy. It noted that the Company provides for Maternity Leave in the employment contract and the same has been granted to other employees in the past. The Respondent further averred that due diligence was followed in line with the Claimant's summary dismissal as under the provisions of section 44(4) of the *Employment Act* and that all statutory deductions were duly remitted. It contended that the terminal dues sought in the instant suit have been exaggerated and do not reflect the true amounts owed, which it already fully settled via a Cheque of Kshs. 60,000 dated 5th April 2023 being one month's salary in lieu of notice less deductions of net income, which the Claimant is yet to collect. The Respondent thus prays that the Claimant's suit be dismissed with costs and interests at such rate as the Court may determine.
6. The Claimant's rejoinder in her Reply to the Respondent's Statement of Defence dated 16th February 2024 was that Kshs. 60,000/- was not her rightful dues and which is why she has not taken the cheque to date. She contended that all the items in her possession were returned to the Respondent through the Counsel on record when she went on maternity leave. She asserted that she has not sought for any statutory deductions in her Statement of Claim and as such, the Respondent's claim that she has exaggerated her dues is baseless.



Claimant's Submissions

7. It was the Claimant's submission that the Court of Appeal in the case of Kenfreight (E.A.) Limited v Benson K Nguti [2016] eKLR stated that termination of employment will be unfair if the Court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair. She argued that considering the Respondent's actions of retaining her in its payroll for more than three (3) months, assigning her work and giving her sale targets even after the contract had lapsed, she got a legitimate expectation. On this submission, the Claimant relied on the decision of the Court in Caroline Kwamboka Kinyulusi v National Environment Trust Fund [2020] eKLR in which the Court observed that for a desperate employee holding on an expired contract and has not expressly been informed of renewal or now renewal of her contract, such circumstances would create very valid expectation of renewal after being kept on the payroll for more than 3 months. The said Court went on to find that the general rule is that when an employee holds over after the expiry of a fixed term contract, the contract converts to a month to month contract so that should the employer wish to terminate the same, there ought to be reasonable notice. The Claimant also cited the case of Thomas Mugambi Nthiga v County Government of Embu & another [2020] eKLR in which the Court upheld the petitioner's claim for legitimate expectation because the employer had allowed him to continue working for 6 months after expiry of his contract.
8. The Claimant submitted that termination of her employment was unfair and that the real reason was not the lapse of the contract. She asked the Court to consider the similar circumstances in the case of Duncan Hasting Liech v Sameer Agricultural & Livestock (K) Ltd (now) Devyan Food Industries (K) Ltd [2022] KEELRC 24 (KLR) in which the claimant's fixed term contract lapsed and he continued working for the respondent who later terminated his services on the basis that his contract had expired and the Court observed that the issue of expiry of contract between the parties did not arise and that the contract had simply been terminated by the employer on allegation that it had expired. The said Court went on to find that the termination of the Claimant's employment contract was not done in accordance with justice and equity.
9. On the issue of discrimination based on her pregnancy status, the Claimant submitted that she furnished the Court with emails that confirm she notified it about her pregnancy status. She noted that the Respondent did not dispute the said emails and that in any event, RW1 confirmed that the Claimant notified him on 3rd April 2024 and he would not be aware if the Claimant's line manager knew about it. She further submitted that she had demonstrated through a Medical Report that she was indeed pregnant and thus belonged to the protected class of women. She argued that Article 27 of [Constitution of Kenya, 2010](#) as read with section 5(3) of the [Employment Act](#) prohibits direct or indirect discrimination of an employee on account of pregnancy. Further, section 46 of the [Employment Act](#) prohibits dismissal from employment on grounds of pregnancy. The Claimant referred the Court to the case of GMV v Bank of Africa Kenya Limited [2013] eKLR wherein the Court analysed the issue of discrimination on account of pregnancy. She noted that the Respondent, on the other hand, did not produce any iota of evidence or appraisals to indicate that she underperformed. That it is for this reason that the sole reason why she was terminated was because of her pregnancy and she was therefore discriminated.
10. As regards the reliefs sought, the Claimant submitted that under section 31(1) and (2) of the [Employment Act, 2007](#), the employee is entitled to be paid housing allowance where the employer does not provide housing or pay a consolidated pay containing housing allowance. The Claimant submitted that from her contract and payslips, she was not paid a housing allowance as her payslips refer to basic pay of Kshs. 77,613/-, which amount does not include a housing allowance. She relied on the case



of *Ayanna Yonemura v Liwa Kenya Trust* [2014] eKLR where the Court was of the view that for an employer to exclude provision of housing or payment of rent to the employee, it is imperative that the contract of service specifically provides that the salary paid is a "consolidated" salary and went on to award the employee housing allowance. The Claimant submitted that having proven she was unfairly terminated, the Court is called upon to consider the remedies under section 49(1) and (4)(a), (b), (e) and (j) of the *Employment Act*. That the Court should subsequently award her 12 months' compensation considering she worked for the Respondent for more than 2 years and had nothing to do with her termination. She posited that she is also entitled to be paid one (1) month's salary in lieu of notice pursuant to her contract of employment.

11. Further, the Claimant noted, on her claim for damages for discrimination, that the Court of Appeal in the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR opined that in addition to the 12 months' salary, the Court may make additional awards where the circumstances so permit. She argued that since the discrimination is linked to her termination, the Court might opt to award her 12 months' salary or damages for discrimination on the basis of pregnancy but not both. She further cited the case of *GMV v Bank of Africa Kenya Limited* (supra) wherein the Court awarded the claimant Kshs. 3 Million as damages for discrimination and did not award the 12 months' compensation for unfair termination or other related remedies. She submitted that with respect to the claim for damages for inability to service a loan due to the Respondent's termination, section 49(4)(j) and (i) of the *Employment Act* entitles her to an award of damages for her inability to service her car loan due to the Respondent's actions. She also argued that she is entitled to a certificate of service pursuant to section 51 of the Act and that her claim for the same is uncontroverted. In conclusion, the Claimant prayed that the Honourable Court allows the prayers sought in her Claim dated 22nd June 2023.
12. The Respondent did not file any submissions.
13. The Claimant was dismissed vide a letter dated 1st April 2023 indicating her contract had lapsed on 31st January 2023. That letter was received on 14th April 2023. Having continued to offer service to the Respondent past the alleged date of the lapse of the contract, it is assumed the contract was automatically extended.
14. The Respondent seemed to disregard the law on termination asserting the contract had lapsed yet it had allowed the Claimant to continue offering it service. It is made worse by the fact that the Respondent was aware of the status of the Claimant and as a protected class she was entitled to better treatment. In her email of 14th April 2023 at 5:03pm she stated that she been accosted with a letter headed EXPIRY OF YOUR EMPLOYMENT CONTRACT. The letter was accompanied by a cheque for Kshs. 60,000/-. She was offered a pittance as her severance package. In the email of 14th April 2023, the Claimant went on to lament that she had disclosed her pregnancy status and was supposed to voluntarily resign, stay on the medical cover till expiry and receive the cheque for April. She wrote that the lapse of her contract on 31st January 2023 cannot be the reason for termination as the company had allowed her to continue working and that she suspected the only reason why her contract was being terminated was because of her pregnancy status. She earned a sum of Kshs. 77,613/- as at the time of her termination. This amount was not indicated to include house allowance which is 15% of the basic pay – Kshs. 11,641.95 a month. She would only be entitled to this for 1 year as it was a continuing wrong. She ought to have pursued it immediately she noticed non-payment.
15. The Claimant was entitled to notice pay prior to her dismissal and payment of any outstanding leave. She claims she was discriminated against and seeks compensation for that. Granted the Respondent discriminated against her on account of her pregnancy, it is inevitable she will recover some damages



from the Respondent. She is not entitled to aggravated damages as was granted in the GMV v Bank of Africa case cited above.

16. In the final analysis I enter judgment for the Claimant against the Respondent for:-
- a. Kshs. 89,254.95 as one month's salary as notice.
 - b. Kshs. 139,703.40 being unpaid house allowance for 12 months.
 - c. 12 month's salary as compensation – Kshs. 1,071,059.40.
 - d. Certificate of service.
 - e. Interest at court rates on the sum in (a) above from the date of filing suit till payment in full.
 - f. Interest at court rates on the sums in (b) and (c) above from the date of judgment till payment in full.
 - g. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

