



**Mutuku v Wine Company Limited (Cause E012 of 2022)
[2024] KEELRC 2234 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2234 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E012 OF 2022
DN NDERITU, J
SEPTEMBER 19, 2024**

BETWEEN

JUSTINE NDUKU MUTUKU CLAIMANT

AND

THE WINE COMPANY LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. In a statement of claim dated 21st April, 2022 filed in court on 27th April, 2022 through K. Kibiku & Co. Advocates the claimant prays for-
 - a. A declaration that the respondent violated and breached the claimant’s rights as enshrined in Articles 27, 28 and 41 of the Constitution.
 - b. A declaration that the respondent breached the claimant’s right to equality and freedom from discrimination guaranteed under Article 27 of the Constitution by dismissing her on the basis of her pregnancy.
 - c. General damages for breach of the claimant’s right to dignity, equality and freedom from discrimination guaranteed under Articles 27, 28 and 41 of the Constitution.
 - d. Exemplary and punitive damages for violation of the claimant’s right to fair labour practices and dismissal of the claimant on the basis of her gender and pregnancy.
 - e. Salary for the months of September 21, October 21, November 21, December, 21, January 22 upto 7th February, 2022..... Kshs 165,666
 - f. Allowances for December 21, January & February 2022..... Kshs 17,500
 - g. One month’s salary in lieu of termination



- Notice..... Kshs 35,000
- h. 12 months salary for wrongful dismissal and unfair termination (35,000 X 12)...Kshs 420,000
 - i. Payment for 55 annual leave days accrued until 7th February, 2022 but not taken..... Kshs 64,166
 - j. Payment for maternity leave accrued but not taken.....Kshs 105,000
 - k. Service pay
 - l. Costs of the suit
 - m. Certificate of service
 - n. Interest on (c)(d)(e)(f)(g)(h)(i)(j) above at court rates until payment in full
 - o. Any other relief that this Honourable Court may deem just and fit to grant.
2. Alongside the statement of claim was filed a verifying affidavit, a written statement by the claimant and, a list of documents and a bundle of copies of the listed documents, all in support of the claim.
 3. On 23rd May, 2022 the respondent entered appearance and filed a memorandum of response to the claim through Murimi, Ndumia, Mbago & Muchela Advocates. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits.
 4. On 21st June, 2022 the claimant filed a reply to the memorandum of response reiterating the contents of the statement of claim and dismissed the memorandum of response praying that judgment be entered against the respondent as prayed in the statement of claim.
 5. The cause came up for hearing on 16th May, 2023 when the claimant (CW1) testified and closed her case. The defence did not avail any witnesses thus closing its case on the same date.
 6. Counsel for both parties addressed the court by way of written submissions. Mr. Kibuku for the claimant filed his submissions on 22nd June, 2023 while counsel for the respondent did not file any submissions.

II. The Claimant's Case

7. The claimant's case is expressed in the statement of claim, the oral and documentary evidence adduced by the claimant, and the written submissions by her counsel.
8. In the statement of claim, the claimant states that she was employed by the respondent, a limited liability company in the business of selling and distributing alcoholic beverages, in its sales department on or about 30th June 2017. It is pleaded that on 16th September, 2020 the claimant was appointed to the position of sales representative, earning a monthly salary of Kshs 35,000 in addition to other allowances.
9. The claimant avers that she undertook her duties diligently and with commitment but it is alleged that in September 2021, without any reasonable or lawful justification, the respondent withheld half of the claimant's monthly salary and only paid a small portion of her due allowances. Further, it is pleaded that the respondent withheld the claimant's entire monthly salary for October, November,



and December, 2021, January, 2022, culminating in her wrongful, unfair, and unlawful dismissal on 7th February, 2022.

10. It is pleaded that the respondent's refusal to pay the agreed monthly salary created a hostile working environment intended to frustrate and constructively dismiss the claimant. Despite seeking an explanation from the respondent's directors, it is pleaded that the claimant received no explanation for the respondent's hostile and unlawful conduct.
11. It is further pleaded that the claimant was dismissed on grounds of alleged poor performance and theft. At the time of her dismissal the claimant was pregnant and yet the respondent failed to pay her salary arrears to enable her meet the maternity medical expenses. It is pleaded that by reason of the foregoing the respondent violated Articles 27 and 41 of the Constitution and Sections 5(3), 18(2)(c) & 41 of the Employment Act (the Act).
12. In her testimony in court the claimant relied on her filed written statement as her evidence-in-chief and produced copies of her listed document as exhibits 1 to 15. She testified that the respondent failed to pay her monthly salary from September to December 2021 and from 1st January to 7th February, 2022 without any lawful reason or explanation.
13. She stated that she proceeded on maternity leave in January, 2022 due to recurring high blood pressure and diabetes. She stated that she applied for maternity leave and the same was approved before proceeding as above. However, vide a letter dated 7th February, 2021, without due process, the respondent summarily dismissed the claimant.
14. It is on the basis of the foregoing that the claimant is seeking for the reliefs recited in the introductory part of this judgment. The submissions by her counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

15. The respondent's case is expressed in the memorandum of response as summarised hereunder.
16. In the respondent's memorandum of response, the respondent denies in toto all the allegations set out in the statement of claim. It is pleaded that the claimant underperformed in her duties and allegedly stole from the respondent by collecting monies owed to the company and failing to remit or account for the same.
17. It is pleaded that the claimant was paid all her due monthly salary, allowances, and bonuses in addition to salary increments based on performance. However, it is alleged that the claimant failed in execution of her duties and allegedly stole from the respondent.
18. It is further pleaded that the claimant wilfully and voluntarily withdrew her services from the respondent. It is alleged that all attempts by the respondent to contact the claimant with a view of reconciliation were ignored by the claimant.
19. It is alleged that the respondent sent a show-cause letter to the claimant for gross misconduct but the claimant did not respond thereto. It is further pleaded that due process was applied in dismissing the claimant.
20. However, it is important to note, as alluded to elsewhere in this judgment, that the respondent did not call any evidence and as such the response to the claim amount to no evidence but mere allegations that are neither supported nor substantiated or proved.



21. It is on the basis of the foregoing that the respondent has pleaded that the claimant's cause be dismissed with costs.

IV. Submissions By Counsel

22. In the written submissions the claimant's counsel did not list down issues for determination by the court. However, counsel submitted as hereunder.
23. In regard to the dismissal counsel cited Sections 43 & 46 of the Act arguing that the dismissal of the claimant was wrongful, unfair, and unlawful as no reason(s) was given, no hearing was afforded to the claimant, and the respondent failed to justify the same during the hearing of the cause in court. It is submitted that the respondent denied the claimant due process. Further, it is submitted that the real reason for the dismissal was the pregnancy. It is further submitted that the respondent acted contrary to the provisions of Section 5 of the Act by discriminating the claimant based on pregnancy.
24. Counsel submitted that the allegations of poor performance and theft made by the respondent in the letter of summary dismissal were mere excuses aimed at justifying the wrongful, unfair, and unlawful dismissal. In any event, the court is urged to note and consider that the respondent did not avail to the claimant a fair hearing for her to respond and defend herself against the said allegations.
25. The court is urged to be persuaded by the reasoning in *GMV v Bank of Africa Kenya Ltd* [2013] eKLR wherein the court held that where discrimination is alleged it is upon the employer to prove that no discrimination occurred. It is submitted that it is only after the claimant proceeded on maternity leave in January, 2022 that the respondent dismissed her. It is submitted that prior to the maternity leave the claimant had served the respondent with dedication and zeal and with a clean disciplinary record for close to five years. It is submitted that it was capricious, whimsical, and malicious for the respondent to withhold the claimant's monthly salary, allow her to proceed on maternity leave, and then while on leave dismiss her without due process after serving for almost five years.
26. It is submitted that the respondent did not offer any evidence in rebuttal to that availed and adduced by the claimant and hence the court is urged to uphold the evidence by the claimant and enter judgment as prayed with costs.

V. Issues For Determination

27. The court has carefully gone through the pleadings filed, the oral and documentary evidence tendered by the claimant, and the submissions by counsel for the claimant. The following issues commend themselves to the court for determination –
- a. Was the claimant wrongfully, unfairly, and unlawfully dismissed?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought?
 - c. Costs.

VI. Termination By Dismissal

28. Section 41 of the Act provides for the procedural steps that shall be taken in terminating and or dismissing employee from service while Section 43 of the Act provides for grounds for terminating or dismissing an employee. Further, Section 45 of the Act provides for grounds of termination or dismissal that are unfair and unlawful.



29. It is not in dispute that the claimant was engaged by the respondent on or about 30th June, 2017 in the respondent's sales department and on 16th September, 2020 she was appointed to the position of a sales representative.
30. The issue in dispute is whether the claimant's dismissal was wrongful, unfair, and unlawful. The evidence on record is that as at the time of dismissal the claimant was pregnant and on maternity leave. The reasons or grounds for her dismissal were stated as gross misconduct based on alleged poor performance and theft and or failure to account for monies collected from the respondent's clients. The letter of summary dismissal reads as follows -

Date: 7th February, 20222

To:

Justine Nduku Mutuku

justinendukumutuku@gmail.com

Nairobi

Dear Ms. Justine,

Re: Summary Dismissal

Management noted that your performance for the last 6 months is below expectations. It was reported that you had zero sales and zero collections.

Furthermore, you have gone ahead to collect goods from clients without permission which is considered as theft.

This is in total violation of the Company rules and regulations and is contrary to your contract terms.

In this regard, management has decided to terminate your services under gross misconduct and investigations shall be carried out of which legal action shall be taken.

Yours Sincerely,

Taj Bedi

Director

cc: Personal file

31. No evidence was availed that the claimant was given a hearing before the respondent issued and served her with the above letter of dismissal. Further, the letter promised investigation aimed at taking legal action against the claimant yet from the evidence availed in court no such investigation or action was ever undertaken.
32. Simply put, the respondent dismissed the claimant without due process - no warning, no show-cause, no hearing, and no compensation is the route that the respondent took. Such capricious and whimsical approach to serious matters of employment and labour relations by the respondent is untenable, wrongful, unfair, and unlawful. There is no reasonable justification as to why the respondent took such draconian action against the claimant. The only plausible explanation can only be found in what the claimant stated that the respondent was unhappy with her pregnancy and applied all means to dismiss her.



33. In *Mbuthia Macharia v Annab Mutua & another* [2017] eKLR the Court of Appeal stated as follows in regard to the burden of proof -
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. In this case, the incidence of both the legal and evidential burden was with the appellant.”
34. The respondent did not avail or adduce any evidence in court. This left the claimant’s evidence and the position that she took unchallenged and unless for good legal reason(s) the court shall go by that evidence.
35. The jurisprudence on what constitutes substantive justification and procedural fairness is now somehow settled through a multitude of decisions from this court (ELRC) – See for example *Mary Chemweno v Kenya Pipeline Company Limited* [2017] eKLR, *Loice Otieno v Kenya Commercial Bank Limited* [2013] eKLR, and *Walter Ogal Anuro v Teachers Service Commission* [2012] eKLR.
36. This court takes the view and holds that the claimant was wrongfully, unfairly, and unlawfully dismissed for lack of both substantive and procedural fairness.

VII. Discrimination

37. The *Black’s Law Dictionary* 9th Edition defines discrimination as -
- 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 disability.
38. Article 27 (4) and (5) of the *Constitution* provides as follows-
- 27 (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
39. Section 5(3)(a) of the Act provides as follows-
- 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.
40. The evidence on record is that the claimant was dismissed upon requesting for and proceeding on maternity leave. There is no evidence of misconduct, gross or otherwise, as alleged by the respondent, and no hearing was given to the claimant before the dismissal. The court arrives at the one and only inevitable conclusion that the respondent dismissed the claimant on the basis of her pregnancy. This cause provides a classic example of discrimination as envisaged in the above-cited provisions of the law.



41. In *G.M.V v Bank of Africa Kenya Limited* (*supra*) the court held that the appellant's termination on the ground of pregnancy was discriminatory, unfair, and unlawful. Likewise, in *Mokaya v Kithure Kindiki t/a Kithure Kindiki & Associates* [2021] KEELRC 1 (KLR), the court held that the respondent had violated Section 5(3)(a) of the Act as read with Article 27(4) of the *Constitution* for terminating the petitioner on account of pregnancy. Again, it was held that the respondent's conduct was discriminatory, unfair, and unlawful.
42. The court takes the view and holds that the respondent's dismissal of the claimant on account of pregnancy was discriminatory, unfair, and unlawful.

VIII. Reliefs

43. Having held that the claimant was wrongfully, unfairly, and unlawfully terminated the court shall now consider each of the reliefs as set out in the introductory part of this judgment.
44. Prayer (a) is for a declaration that the respondent violated and breached the claimant's rights enshrined in Articles 27, 28, and 41 of the *Constitution*. The foregoing provisions in the *Constitution* provide as follows –

Equality and freedom from discrimination.

27.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

28. Every person has inherent dignity and the right to have that dignity respected and protected.

Labour Relations.

41.



- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.
- (3) Every employer has the right—
 - (e) to form and join an employers organisation; and
 - (f) to participate in the activities and programmes of an employers organisation.
- (4) Every trade union and every employers' organisation has the right—
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

45. The court arrives at the rather obvious conclusion that the respondent violated the claimant's rights as pleaded and prayed and a declaration shall issue accordingly.

46. Prayer (b) is for a declaration that the respondent breached the claimant's right to equality and freedom from discrimination guaranteed under Article 27 of the *Constitution* by summarily dismissing her on the basis of pregnancy. Guided by Article 27 of the *Constitution* and Section 5(3)(a) of the Act and grounded on the finding above in regard to prayer (a) the court shall issue a declaration as prayed.

47. Prayer (c) is for general damages for breach and violation of the claimant's right to dignity, equality and freedom from discrimination guaranteed under Articles 27, 28, and 41 of the *Constitution*. Article 27 provides for equality and non-discrimination, Article 28 provides for right to human dignity, and Article 41 provides for rights in labour relations and in particular fair labour practices. The court has found and held that the claimant was discriminated on the basis of pregnancy, she was unfairly treated and denied salary for several months, she was denied due process, and she was subjected to unfair labour practices. The court shall consider an award of damages for the same alongside prayer (d) hereunder.

48. Prayer (d) is for exemplary and punitive damages for violation of the claimant's right to fair labour practices and dismissal on the basis of her gender and pregnancy. In *G.M.V v Bank of Africa Kenya Limited* (supra) the court awarded Kshs 3,000,000/= in general damages for discrimination based on pregnancy.

49. The court has found that the respondent discriminated the claimant on the basis of pregnancy and simultaneously violated her right to fair labour practices. Those rights are enshrined in Articles 27, 28, & 41 of the *Constitution*. Those constitutional violations are not compensable or remediable under the provisions of the Act. However, in making an award the court shall inevitably consider the other



awards, especially that of compensation for wrongful, unfair, and unlawful dismissal under Section 49 of the Act as discussed below. In the circumstances, considering the entire circumstances and the nature of the violations, the court is of the considered view that a global sum of Kshs 1,500,000/= is a fair and adequate award for prayers (c) and (d) combined.

50. Prayer (e) is for salary arrears for September, October, November, and December 2021, and for January to 7th February, 2022 amounting to Kshs 165,666/=. No evidence was availed by the respondent to disprove the claim and or demonstrate that the claimed arrears were paid.
51. The reasoning above applies to prayer (f) for allowances for December 2021, January and February, 2022 amounting to Kshs 17,500/= which is hereby allowed.
52. Prayer (g) is for one month's salary in lieu of notice in the sum of Kshs 35,000/=. The court is guided by Section 36 of the Act and the prayer is allowed.
53. Prayer (h) is for 12 months' salary for wrongful, unfair, and unlawful dismissal. The court has considered the entire and unique circumstances of this cause. As at the time of dismissal the claimant had worked for the respondent for about five years with a clean disciplinary record. The respondent embarrassed and discriminated the claimant dismissing her on basis of pregnancy. The respondent was insensitive and inconsiderate. The relationship between the parties was completely ruined by the respondent and there is no chance that the parties may re-engage as no such intentions were expressed during the hearing of the cause. There is no evidence that the claimant contributed to her dismissal in any way or manner. The claimant must have suffered serious mental anguish and pain as a result of the notoriously cruel, wrongful, unfair, and unlawful dismissal.
54. While the court has already made an award for violation of the claimant's constitutional rights above, it is my considered view that this is an appropriate case for an award of the maximum compensation allowed under Section 49(1)(c) of the Act amounting to Kshs 420,000/= which is hereby allowed as prayed.
55. Prayer (i) is for payment for 55 days of annual leave accrued but not taken for the period until 7th February, 2022 amounting to Kshs 64,166/=. As the custodian of the employment records under Sections 10 & 73 of the Act the respondent ought to have availed the same in rebuttal of this claim and the evidence adduced by the claimant. This prayer is allowed as prayed.
56. Prayer (j) is payment for maternity leave accrued but not taken amounting to Kshs 105,000/=. For the same reasoning as in the above paragraph this prayer is allowed as prayed.
57. Prayer (k) is service pay. The claim was quantified in the submissions by the claimant's counsel in the sum of Kshs 87,500/= based on the provisions of Section 35(5) of the Act. There is no evidence availed by the respondent that the claimant was a member of a pension scheme or that the respondent paid any deductions to National Social Security Fund (NSSF). In the circumstances the claim is allowed as prayed.
58. Prayer (m) is for a certificate of service. The court allows the prayer in line with Section 51 of the Act. The respondent shall issue and deliver to the claimant a certificate of service as per the order below.

IX. Costs

59. The claimant is awarded the costs of the cause.

X. Disposal

60. In the disposal of this cause the court issues the following orders -



- a. A declaration be and is hereby issued that the respondent violated and breached the claimant's rights as enshrined in Articles 27, 28, and 41 of the Constitution.
- b. A declaration be and is hereby issued that the respondent breached the claimant's right to equality and freedom from discrimination guaranteed under Articles 27, 28, and 41 of the Constitution.
- c. In compensation for (a) & (b) above the claimant is awarded a global sum of Kshs 1,500,000/=
- d. The claimant is awarded compensation in the sum of Kshs 2,377,332/= made up as follows -
 - i. General damages..... Kshs 1,500,000/=

This item shall not be subject to statutory deductions. All the other awards below are subject to statutory deductions.
 - ii. One month's salary in lieu of notice..... Kshs 35,000/=
 - iii. Salary for Sept, Oct, Nov, Dec 2021 & Jan and Feb 2022..... Kshs 165,666/=
 - iv. 12 months' gross salary in compensation Kshs 420,000/=
 - v. Accrued annual leave Kshs 64,166/=
 - vi. Maternity leave pay Kshs 105,000/=
 - vii. Service pay Kshs 87,500/=

TOTAL Kshs 2,377,332/=
- e. The respondent shall issue and deliver a certificate of service to the claimant within 30 days of this judgment.
- f. Costs of the cause to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 19TH DAY OF SEPTEMBER, 2024.

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DAVID NDERITU
JUDGE

