



**Ingasiani v Elevator General Services Kenya Limited & another (Cause E340 of 2023) [2024] KEELRC 2556 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2556 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E340 OF 2023  
SC RUTTO, J  
OCTOBER 18, 2024**

**BETWEEN**

**JUDITH INGASIANI ..... CLAIMANT**

**AND**

**ELEVATOR GENERAL SERVICES KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE MILIMU SAHANI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through a Statement of Claim filed on 7<sup>th</sup> April 2023, the Claimant avers that she was an employee of the 1<sup>st</sup> Respondent for a period of three years with effect from 15<sup>th</sup> January 2019 to March 2021. She avers that she was not issued with a letter of appointment or a written contract of employment despite her requests for the same.
2. According to the Claimant, she worked diligently, professionally and competently despite the 1<sup>st</sup> Respondent's habitual delays and or failure to pay her salary at given times.
3. From the Claimant's account, the employment relationship started to head south when she conceived in 2021 and was to proceed on maternity leave with effect from 1<sup>st</sup> November 2022. She avers that the 2<sup>nd</sup> Respondent granted her leave reluctantly.
4. It is the Claimant's case that she was booked for an emergency caesarian section procedure on 15<sup>th</sup> October 2021 hence she started her maternity leave earlier. That upon resumption of work from maternity leave, she could not be rehabilitated having undergone a medical operation. She asked the Respondent to allow her take her annual leave for 2021 in addition to her maternity leave and to be allowed to report back to work on 1<sup>st</sup> March 2022. She contended that she was not paid during the leave period despite several phone calls demanding and requesting to be paid.



5. The Claimant further states that when she reported back to work on 1<sup>st</sup> March 2022, she met the 2<sup>nd</sup> Respondent who called her to his office and informed her of her termination. She was informed that “due to her circumstances, the company had decided that it had become unsustainable to continue with her as an employee of the company”.
6. The Claimant contends that there was no written communication and no notice was given to her nor payment in lieu of notice.
7. It is the Claimant’s further contention that she was dismissed unfairly and her efforts to be told of the reason for her termination were ignored. It is the Claimant’s position that she had never been served with any concerns regarding her conduct or work performance. According to her, the working relationship was good until she went on maternity leave.
8. In the Claimant’s view, the decision to terminate her was influenced by her pregnancy which resulted in her going on maternity leave which she was forced to prolong under medical advice. She is further convinced that the company’s refusal to pay her salary during maternity leave, and the decision to terminate her had long been reached before her resumption from maternity leave and was influenced by her pregnancy and the eventual maternity leave.
9. It is against this background that the Claimant prays for the following reliefs:
  - a. A declaration that the Claimant’s termination was unfair for want of valid and lawful reasons;
  - b. A declaration the termination of the Claimant was unlawful for want of procedure;
  - c. A declaration that the Claimant was subjected to discrimination by the Respondents in violation of her right under the Employment Laws and *the Constitution*;
  - d. Compensation of Kshs.240,000 for unfair and unlawful termination being an equivalent of 12 month’s salary;
  - e. Kshs,1,500,000 being compensation violation of Labour and Constitutional rights against discrimination;
  - f. Kshs.500,000 exemplary damages for torture and financial perseverance for unpaid salaries and arrears;
  - g. Unpaid housing allowance on the basis of her monthly salary;
  - h. Kshs.20,000 Notice pay;
  - i. Kshs. 80,000 being 4 months’ salary unpaid in year 2021;
  - j. Kshs 60,000 being payment for 3 months (November 2021 - January 2022, months inclusive) maternity leave;
  - k. Kshs.20,000 being payment for annual leave taken in February 2022;
  - l. Kshs. 40,000 being payment for accumulated annual leave days in years 2019 and 2020;
  - m. Payment in lieu of deducted but unremitted NHIF and NSSF statutory deductions as shall be computed in the submissions hereof;
  - n. An order that the Respondents issue the Claimant with a certificate of service;
  - o. Interest on the net award at court rates until payment in full; and



- p. Costs of this suit.
  - q. Any other consequential orders or relief as deemed fit by the court.
10. Upon being served with the Notice of Summons and Statement of Claim, the Respondents entered appearance through the firm of Edward C. Asitiba & Associates. Beyond the Memorandum of Appearance, there was no Defence filed on behalf of the Respondents. This was despite the Respondents' Counsel being granted 21 days leave to do so on 15<sup>th</sup> February 2024. In essence, the Respondents did not participate in the trial.
11. Subsequently, the matter was set down for hearing on 2<sup>nd</sup> May 2024, during which the Claimant testified in support of her case. The Claimant sought to rely on her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed on her behalf as her exhibits before Court.

### **Submissions**

12. The Claimant submitted that she was dismissed unfairly and unlawfully and that she was never given reasons for her termination despite seeking to be informed. She further submitted that her termination was done outside the bounds of the lawful process and procedure. It was her further submission that the Respondents failed to adhere to the mandatory provisions of section 41 of the *Employment Act*, 2007.
13. Placing reliance on the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR and Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004, the Claimant urged the Court to find that the Respondents violated her rights against discrimination in the manner in which she was handled prior to, while on and after her leave.

### **Analysis and Determination**

14. Arising from the Claim before me, the evidence on record and the Claimant's submissions, the following issues stand out for determination:
- a. Was the Claimant's termination unfair and unlawful?
  - b. Whether the Claimant was discriminated on grounds of pregnancy;
  - c. Is the Claimant entitled to the reliefs sought?

### **Unfair and unlawful termination?**

15. Section 43(1) of the *Employment Act* (Act), requires an employer to prove the reasons for termination and failure to do so, such termination is rendered unfair. Further to the foregoing, Section 45 (2) (a) and (b) of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
16. Beyond proving the reasons for termination of employment, an employer is also required to prove that in terminating an employee, it applied a process that is fair. This is the import of Section 45 (2) (c) of the Act. As to what entails a fair procedure, Section 41(1) of the Act mandates an employer to notify an employee of the intended termination and the reasons thereof in a language he or she understands. In so doing, the employee is entitled to have another employee or a shop floor union representative present during such explanation.



17. Fundamentally, the foregoing constitutes the legal threshold applicable in determining a case of unfair termination.
18. Turning to the case herein, the Claimant has alleged that upon resuming work from maternity leave, she was verbally terminated from employment by the 2<sup>nd</sup> Respondent who informed her that “due to her circumstances, the company had decided that it had become unsustainable to continue with her as an employee of the company.”
19. This position was not controverted by the Respondents as they did not file a Defence. In terms of Sections 43 (1) and 45(2) (a) and (b) of the Act, the onus was on the 1<sup>st</sup> Respondent to prove the reasons for separating with the Claimant and further, that such reasons were fair, valid and related to her conduct, capacity, compatibility or its operational requirements.
20. Having failed to file a Defence and adduce evidence, it goes without saying that the 1<sup>st</sup> Respondent failed to discharge its evidential burden as by law required.
21. Further to the foregoing, the 1<sup>st</sup> Respondent did not prove that it applied a fair process in disengaging with the Claimant for whatever reason. In this regard, the 1<sup>st</sup> Respondent was at fault for want of procedure.
22. All in all, the 1<sup>st</sup> Respondent did not discharge its evidential burden in terms of Sections 41, 43 and 45 of the Act, hence I am led to conclude that the Claimant’s termination from employment was unfair and unlawful.

#### **Discrimination?**

23. The Claimant has further cited the Respondents for discrimination on account of her pregnancy. It is the Claimant’s case that the working relationship with the 1<sup>st</sup> Respondent was good until she went on maternity leave. In this regard, the Claimant attributed her termination from employment to her condition.
24. By dint of Section 5(7) of the Act, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that section. Be that as it may, the employee is first required to establish a prima facie case for discrimination in order for the burden to shift.
25. The Court (Rika J) in the case of *G M V vs Bank of Africa Kenya Limited* [2013] eKLR, reckoned that “All the ladies are required to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to:-Establish she belongs to a protected class; Demonstrate she qualified for the job she lost; Show 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; Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy...”
26. Fundamentally, the employee alleging discrimination on grounds of pregnancy must first establish that she was pregnant at the material time hence belonged to a protected class.
27. In this case, the Claimant did not establish through cogent evidence that at the material time, she was pregnant. Save for pleading that she was pregnant and that she proceeded on maternity leave with effect from 15<sup>th</sup> October 2021, there was no evidence in the form of medical records or birth notification to confirm this fact and thus prove that she belonged to a protected class.



28. In so finding, I have taken note of the letter dated 11<sup>th</sup> October 2021, exhibited by the Claimant. I must say that the said letter is quite confusing as it appears to be emanating from the Claimant whereas it is apparent that it was signed by the 2<sup>nd</sup> Respondent. The closing paragraph of the letter further compounds the confusion as it states as follows: “You are hereby therefore required to report back for duty on 1<sup>st</sup> March 2022 without fail.”
29. In light of the foregoing, the Court is left at a loss and is unable to ascertain the true import of the said letter.
30. Assuming the letter emanated from the Claimant and that she was applying for maternity leave, there is no evidence that her request was rejected by the Respondents or that she was granted leave reluctantly.
31. The bottom line is that beyond the Claimant’s assertion that she was pregnant at the material time, she needed to corroborate her assertion with some form of evidence to prove as much. In this case, she didn’t, hence her claim that she was discriminated against by the Respondents on grounds of pregnancy cannot be sustained.

### **Reliefs?**

32. As the Court has found that the 1<sup>st</sup> Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment and that it subjected her to a fair process prior to termination, the Court awards her one (1) month’s salary in lieu of notice and compensatory damages equivalent to five (5) months of her last salary. This award takes into consideration the length of the employment relationship.
33. The Claimant has further claimed unpaid salary for four (4) months in 2021 and from November 2021 to January 2022. As the Respondents did not file a Defence or adduce evidence, this claim was not controverted hence there is no evidence that the Claimant was paid accordingly. To this end, this relief succeeds.
34. As to the claim for unpaid leave days, the Claimant is only entitled to payment in respect of 18 months preceding the separation. This is pursuant to Section 28(4) of the Act.

### **Orders**

35. In the final analysis, Judgment is entered in favour of the Claimant against the 1<sup>st</sup> Respondent as follows:
  - a. A declaration that the Claimant’s termination from employment was unfair and unlawful.
  - b. The Claimant is awarded one (1) month’s salary in lieu of notice being Kshs 20,000.00.
  - c. The Claimant is awarded compensatory damages in the sum of Kshs 100,000.00 being equivalent to five (5) months of her gross salary.
  - d. The Claimant is awarded the sum of Kshs 140,000.00 being outstanding salary arrears for seven (7) months.
  - e. The Claimant is awarded unpaid leave days being Kshs 21,000.00
  - f. The total award is Kshs 281,000.00.
  - g. Interest on the amount in (f) at Court rates from the date of Judgment until payment in full.
  - h. The Claimant shall have the costs of the suit.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF OCTOBER 2024.

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant Mr. Khavagali

For the Respondents Mr. Asitiba

Court Assistant Millicent Kibet

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 had 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 *Civil 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.

**STELLA RUTTO**

**JUDGE**

