



**Paul v Board of Management Holy Spirit Secondary School (Cause
808 of 2018) [2023] KEELRC 194 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 194 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 808 OF 2018
BOM MANANI, J
JANUARY 30, 2023**

BETWEEN

PHILOMENA KITONY PAUL CLAIMANT

AND

**BOARD OF MANAGEMENT HOLY SPIRIT SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

1. Until her termination around April 5, 2017, the Claimant was an employee of the Respondent as a teacher. She alleges that the Respondent terminated her services on account of her pregnancy. The Claimant therefore prays for a declaration that her termination from employment was discriminatory, unfair and unlawful. She also prays for compensation as more particularly set out in the Memorandum of Claim.
2. The Respondent does not admit the claim. According to the Respondent, the Claimant was incompatible with the student population at the Respondent's school. This forced the Respondent to take the decision to terminate her contract of employment. The Respondent contends that the Claimant's termination was for valid reason and in accordance with due process.

Claimant's Case

3. The Claimant avers that she was hired by the Respondent on May 9, 2016 to offer teaching services. That her contract, which was initially on probationary terms, was confirmed on September 5, 2016 and a letter of appointment issued to her.
4. The Claimant avers that her monthly salary was Kshs 13,000/-. That this did not include house allowance.



5. The Claimant avers that for the duration she served the Respondent, she was not granted leave. And neither was she paid leave pay in lieu of accrued leave.
6. It is the Claimant's case that she conceived in the year 2016. At the commencement of April 2017, she requested for maternity leave for three months. According to her letter dated April 4, 2017, the leave was to run from the beginning of April 2017 to the end of June 2017.
7. The Claimant asserts that when the school's management received her leave request, they reacted by terminating her contract of employment. The Claimant avers that her termination was triggered by her pregnancy.
8. To prove the fact of pregnancy, the Claimant produced antenatal reviews running from November 2016 onwards. She also produced a birth certificate showing that she delivered on April 18, 2017.
9. According to the Claimant, she was terminated immediately the Respondent received her request for maternity leave on April 5, 2017. The Claimant states that the termination was communicated orally to her. That no reasons were given by the Respondent to justify the termination.
10. The Claimant states that prior to her termination, she had not received any adverse communication from the Respondent. And neither was she summoned for a disciplinary meeting before she was relieved of her employment.
11. According to the Claimant, the only reason that can account for her release was her pregnancy. This is particularly so because, the termination happened without apparent reason but immediately upon delivery of her request for maternity leave for three months commencing April 2017.

Respondent's Case

12. On its part, the Respondent denies that the Claimant was terminated for reasons of her pregnancy. According to the Respondent, the Claimant was a poor performer. As a result, students consistently performed poorly in her subjects. According to the Respondent's witness, the average score in the subjects taught by the Claimant was grade 'D'.
13. The Respondent also accuses the Claimant of being cruel to students. The Respondent states that the Claimant was generally incompatible with the student population, a matter that necessitated the decision to terminate her contract of employment.
14. The Respondent contends that the Claimant is not entitled to the prayers in her claim. It is stated that the Claimant took her leave during school holidays. It is also contended that her salary was consolidated to cover house allowance.
15. The Respondent denies that the Claimant was terminated for reasons of pregnancy. According to the Respondent, the school has a maternity leave policy which is consistent with the law and all teachers entitled to this leave usually take it. As a matter of fact, the Respondent denies that the school was aware of the pregnancy condition of the Claimant.

Issues for Determination

16. After analyzing the pleadings and evidence on record, it is evident that the parties do not contest the fact that they had the employer-employee relation up to early April 2017. Consequently, the court will proceed on the premise that the fact of employment is admitted.



17. The only contested issues in the cause are as follows:-
 - a. Whether the Claimant's contract of employment was unfairly terminated.
 - b. Whether the parties are entitled to the reliefs pleaded in their respective pleadings.

Analysis and Determination

18. It is perhaps appropriate to begin with setting out the law on termination of contracts of employment as envisaged under the *Employment Act*. Other than redundancy, death, retirement, insolvency, resignation and dissolution through mutual agreement, contracts of employment may be terminated through the unilateral decision of the employer on account of gross misconduct, incompetence or physical incapacity of the employee. Of relevance to this case is termination on account of incompetence or poor performance of the employee to execute the task assigned to her.
19. Section 41 of the *Employment Act* recognizes incompetence or poor performance as a ground for terminating an employee. Incompetence is the inability of the employee to measure up to the expectations of the employer with regard to executing the task assigned to him. Black's Law Dictionary defines it as the fact of 'being unable or unqualified to do something.' Incompetence is usually associated with poor or lack of training of the employee for the task in question.
20. Like incompetence, poor performance also denotes the failure by an employee to meet the agreed standard of work at the workplace. George Ogembo in his text titled *Employment Law Guide for Employers*, revised edition, describes poor performance as execution of duty that leaves 'a gap between the employee's actual performance and the level of performance required by the employer.'
21. Whilst the law recognizes the right of the employer to terminate an employee on the ground of incompetence or poor performance, such decision must follow some objective pathway. This reality is well articulated by Justice Ndolo in *Maghanga Newton Raphael v Panal Freighters Limited [2021] eKLR* when she observed as follows:-

' The procedure for terminating employment on the ground of poor performance is now clear and it is this; that the employee is first made aware of their shortcomings and allowed a reasonable time to improve. Further, any performance appraisal upon which the decision to terminate is made must have the input of the employee.'
22. Poor performance presupposes that the employer agreed with the employee on specific deliverables within a specified period of time which the employee has failed to meet. An employer can only rely on the ground of poor performance to terminate an employee if he is able to demonstrate that the employee was expected to meet some objectively measurable standard of productivity that is reasonably expected of employees in the sector but the employee has failed to do so despite being afforded a chance to improve (see *Alois Makau Maluvu v Cititrust Kenya Limited & another [2018] eKLR* and *Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR*).
23. Under section 41 of the *Employment Act*, the employer must subject such employee to the usual disciplinary process before terminating him. The employee should be notified that the employer proposes to terminate him on the ground of poor performance; and the employee should be allowed to express himself on the matter in his own defense.
24. Importantly, it is critical that the employer affords the employee a chance to improve by placing him on a performance improvement plan. There must then be evidence that the employee has been taken



through improvement evaluation over some set period of time but has not shown signs of change (see [Grace Atieno Onyango v St. Hannab's Preparatory School Limited \[2015\] eKLR](#)).

25. Under section 43 of the [Employment Act](#), the burden of proof that the employer had valid reason to terminate the employee and that the termination was in accordance with the requirements of due process rests with the employer. Although section 47 of the Act requires the employee to prove the unfairness of the termination, this requirement is deemed as satisfied once the employee presents prima facie evidence in this respect. Where the employer fails to prove the validity of a termination in terms of section 43 of the [Employment Act](#), a presumption arises in favour of the unfairness of the decision to terminate in terms of section 45 of the Act.
26. In the current case, whilst the Respondent accuses the Claimant of poor performance, there was not an iota of evidence placed before the court to justify this accusation. Whilst the Respondent's witness alluded to students having performed dismally during the time the Claimant was teaching them, no cogent evidence of this was laid before the court.
27. The Respondent did not provide evidence of the performance targets, if at all, that were discussed and agreed on with the Claimant as she begun to work for the Respondent. And neither was there evidence of periodic reviews of performance targets if they existed.
28. There was no evidence that the Respondent has developed performance measuring instruments that the employees were aware of. And neither was there evidence that if they exist, such instruments were developed objectively with the input of the affected employees.
29. There was no evidence from the Respondent to demonstrate that the issue of the Claimant's poor performance had been raised with her. There was no evidence that she had been given an opportunity for improvement but failed to register any improvement in her output.
30. Although the Respondent accuses the Claimant of incompatibility with students, no cogent evidence was placed before the court to verify this accusation. No reports were presented from any student raising complaints regarding the Claimant's temperament.
31. The Respondent did not provide evidence to demonstrate that it had convened a disciplinary meeting at which the Claimant was required to account for her temperament and inability to perform to the standard set by the Respondent. There was no evidence that the Claimant was allowed an opportunity to respond to the Respondent's accusations of poor performance and incompatibility.
32. In view of the foregoing, it is highly improbable that the Respondent's decision to terminate the Claimant can reasonably be accounted for on the grounds of poor performance and incompatibility. It appears more probable than not that the decision was motivated by factors other than the Claimant's performance and temperament.
33. The Claimant's case was that her termination was motivated by the fact of her pregnancy. She stated that she conceived in 2016 and delivered on April 18, 2017. The birth certificate tendered in evidence demonstrates that indeed the Claimant delivered her baby on the aforesaid date. There is also proof that she was attending antenatal care clinics from 2016.
34. The Claimant asserts that when she applied for maternity leave on April 4, 2017, she was terminated the following day. She tendered the letter applying for maternity leave in evidence.
35. The Respondent's witness denied receiving the letter. The basis of the denial was that the letter did not have a received stamp from the Respondent's office. However, during cross examination of the Respondent's witness, the Claimant's counsel was able to demonstrate that the Claimant's letter of April 4, 2017 was not the first one to have been received by the Respondent's office without being



- stamped as received. Other documents, including the Claimant's application for employment, had been handled in the same way. I am therefore convinced that indeed the Claimant delivered to the Respondent her request for maternity leave as indicated in her evidence.
36. The Respondent has also cast aspersions on the letter requesting for maternity leave on the ground that it was filed in court much later after the claim had been filed. The Respondent invites the court to find that because of this, the letter must be a fabrication. I do not agree with this observation. The fact of pregnancy of the Claimant has been established by other evidence such as the antenatal care records and birth certificate of the child. The birth happened on April 18, 2017, two weeks after the Claimant allegedly requested to be allowed to proceed on maternity leave. It is therefore more probable than not that in view of the fact that the Claimant was due to deliver shortly after April 1, 2017 she applied to proceed on leave around that time. In this context, the court is inclined to believe that the letter dated April 4, 2017 is genuine.
 37. The Respondent denies knowledge of the Claimant's pregnancy two weeks to her delivery. The court takes judicial notice of the condition of advanced pregnancy in a woman. It is highly improbable that this condition will not be noticed by a naked eye two weeks to delivery. In the premises, I consider as highly incredible the Respondent's evidence that the school had not noticed the pregnancy of the Claimant.
 38. The court infers from the totality of the foregoing that the Respondent's witness was most likely trying to feign ignorance of the Claimant's condition in a bid to advance the Respondent's defense that it terminated the Claimant for reasons other than pregnancy. However, the termination of employment coming within hours of the Claimant's request for maternity leave leads to the irresistible conclusion that she lost her job because of her pregnancy condition.
 39. Under section 5 of the *Employment Act*, once an employee presents prima facie evidence pointing to discriminatory treatment against her by the employer, the burden of proof shifts onto the employer to demonstrate that there was no discrimination as alleged by the employee (see *G M V v Bank of Africa Kenya Limited [2013] eKLR*). In my humble view, the Respondent has failed to place before the court sufficient evidence to rebut the prima facie evidence by the Claimant pointing to discriminatory treatment against her.
 40. The law proscribes differential treatment of employees based on attributes such as pregnancy. This is proscription is founded on article 27 of the *Constitution* as read with section 5 of the *Employment Act*. Consequently, to the extent that the Respondent found it appropriate to terminate the Claimant's employment for reasons of her pregnancy, it discriminated against the Claimant on the ground of her pregnancy. As a result, the Claimant's termination is declared unlawful and unfair.
 41. The other issue for consideration is whether the parties are entitled to the reliefs sought in their pleadings. Undoubtedly, the prayer by the Respondent that the Claimant's suit ought to be dismissed with costs to the Respondent is undeserved.
 42. With respect to the Claimant, I have noted that she was yet to serve the Respondent for one year. In terms of section 28 of the *Employment Act*, she was yet to earn her leave entitlement. Accordingly, the claim for leave pay is declined.
 43. From the contract of employment, it is clear to me that the offer of employment made to the Claimant was conditional on the Claimant accepting a consolidated salary of Kshs 13,000/ which was expressly indicated to be inclusive of house allowance. Where the contract of employment expressly indicates that the consolidated salary paid to an employee includes house allowance, then in terms of section



- 31(2) of the [Employment Act](#), the employee cannot claim this benefit as a standalone benefit. As a result, the claim for house allowance is declined.
44. On compensation for wrongful termination, I take cognizance of the fact that the Claimant was serving under a two year contract. At the time of her termination, she had already served approximately seven (7) months of the term. Taking this factor on board, I will award her compensation for wrongful termination equivalent to her salary for four (4) months. This works out to Kshs 52,000/.
 45. Under section 35(5) of the [Employment Act](#), service pay accrues to employees who have been in service of the employer for at least one year. From the record, the Claimant had not attained this period of service. She is therefore not entitled to claim service pay.
 46. It has often been said that there is no guarantee in employment. As a consequence, unless the contract of employment specifically says so, an employee working under a fixed term contract cannot insist to be paid salary for the unexpired term of the contract should the contract terminate midterm. This is particularly so when the contract has a termination clause. This point is made in [Andrew Mwaniki Gachuba v National Oil Corporation of Kenya \[2018\] eKLR](#) when Onyango J said as follows:-
“The claimant further prayed for payment of the balance of his contract term. The contract having provided for a termination clause, the claimant is not entitled to payment of the unexpired term. The [Employment Act](#) does not provide for the same but instead provides for compensation for unfair termination.”
 47. As indicated, it is only in instances where the contract of service provides for payment to an employee of salary for the unexpired term that a court may order that such salary be paid in the event of the contract terminating midterm. This was the case in [Minnie Mbue v Jamii Bora Bank Limited \[2017\] eKLR](#).
 48. The Claimant’s contract has a termination clause. The contract does not obligate the Respondent to pay the Claimant salary for the unexpired term should the parties separate midterm. Thus, the court cannot rely on the decision in *Minnie Mbue v Jamii Bora Bank Ltd (supra)* to require the Respondent to pay the Claimant salary for her unexpired term. In view of this, I decline to grant an order for payment of salary for the unexpired term of the Claimant’s contract.
 49. As indicated earlier, the Claimant’s termination was on account of her pregnancy. This constituted discriminatory treatment. Following the guide in *G M V v Bank of Africa Kenya Limited [2013] eKLR* I award the Claimant general damages for violation of her right not to be subjected to discriminatory treatment. I award her general damages of Kshs 500,000/-.
 50. I order that the Respondent issues the Claimant with a Certificate of Service.
 51. The amount awarded shall attract interest at court rates from the date of judgment till payment in full.
 52. The Claimant shall be paid costs of the case.
 53. Where applicable, the award is subject to the statutory deductions as directed under section 49 of the [Employment Act](#).

Summary of Award

- a. The Claimant’s termination is declared discriminatory and unfair.
- b. The claims for house allowance, leave pay and service pay are declined.
- c. The Claimant is awarded compensation for unfair termination that is equivalent to her gross salary for four (4) months that is to say Kshs 52,000/=.



- d. The Claimant is awarded general damages for discriminatory treatment against her of Kshs 500,000/=.
- e. The amount so awarded shall attract interest at court rates from the date of judgment till payment in full.
- f. The Claimant shall be paid costs of the suit.
- g. The Respondent to issue the Claimant with a Certificate of Service.
- h. Where applicable, the award is subject to the statutory deductions as directed under section 49 of the [Employment Act](#).

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

