



**Omondi v Halifax Estate Agency Ltd (Cause 273 of 2017)
[2023] KEELRC 760 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 760 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 273 OF 2017
AN MWAURE, J
MARCH 28, 2023**

BETWEEN

BERYL ACHIENG OMONDI CLAIMANT

AND

HALIFAX ESTATE AGENCY LTD RESPONDENT

JUDGMENT

1. The claimant by way of the Memorandum of claim dated the 7th February 2017 and filed on the 13th February 2017 alleges unfair termination. She says that she was employed on or about the 11th of January 2016 as a Sales Representative of the Respondent at a salary of Ksh 40,000/= per month. She was abruptly admitted to hospital on the 22nd July 2016, as she was experiencing premature labour. She says she dutifully informed the Respondent company director of her state and subsequent absenteeism from work.
2. She demanded for maternity leave as required by the law on the 1st August 2016 which was denied. On the 9th August 2016 the claimant received a letter dated 29th July 2016 informing her that her services were terminated. There was no notice or payment *in lieu* of notice, outstanding wages owed to her, severance pay and or vacation pay.
3. The claimant avers that as a result of the unexpected termination, she found herself unemployed, with no outstanding wages, vacation pay, pay *in lieu* of notice, severance pay and aggravated damages resulting from emotional distress associated with having her employment terminated without notice. The claimant says the Respondent breached the actual and implied employment contract it had with her.
4. The claimant asks court for the following prayers;
 - a. A declaration that she was wrongfully and unfairly terminated from her employment



- b. Unpaid dues totalling Ksh 149, 333.33/=
- c. Notice Period of one-month Ksh 40,000/=
- d. 12 months' salary as compensation for wrongful and unfair termination Ksh 480,000/=
- e. Punitive and aggravated damages for breach of the claimants' constitutional rights.
- f. Costs incidental to this suit.

Respondent's Case

- 5. The Respondent filed memorandum of response on the 09/12/2019. The Respondent says that the claimant never intimated that she was unwell nor supplied the Respondent with medical records explaining her alleged condition or granting her a sick off for the duration of her absence from work and was never aware that she was pregnant. It is further said that she wilfully and deliberately absconded work. The Respondent asks for the case to be dismissed with costs.
- 6. The claimant filed a reply to the response to the claim reiterating the contents of the memorandum of claim.

Claimant's Evidence

- 7. The Claimant, Beryl Achieng Omondi gave sworn testimony and said that she was employed by the Respondent from January 2016 to July 2016. She says she reported to work in July as usual and on the 22/7/2016 at 10. 30 a.m was rushed to the hospital. She says she was with a colleague called Sammy Shitanda. She confirms she informed the company that she had been admitted in hospital. She testified that she was admitted at the hospital for three days and her new born baby was admitted for another 2 weeks.
- 8. She said that she then went to see the Director of the Respondent and the HR manager but the meeting did not go well as she was dismissed out of the office. The claimant says Mr Kumar who is the Director complained that she did not inform him about her pregnancy. She says she was then called for a letter for her collection and she asked a colleague to read the letter for her but the colleague was unwilling to do so. She then sent her husband for the letter and found out that it was a termination letter.
- 9. She says that she asked the administrator for her dues who said that she would be advised. She says she was not paid her salary or pay *in lieu* of leave. Claimant says she was not given notice prior to her termination.
- 10. On cross examination she said that she was never given an appointment letter and has no records to show that she requested for appointment letter. She says she was a permanent employee. About her maternity leave she says she informed the Respondent of her admission to the hospital.

Respondent's Evidence

- 11. Respondent's Witness Kumar Patni gave sworn testimony and he confirmed is the director of the Respondent Company. He testified that the Claimant was a sales representative and he had no contract with the claimant and they would give her a retainer of Ksh 40,000/= payable in two instalments per month. If she received a commission, she would be given a voucher and would then sign. He produced the vouchers as exhibits in the case.



12. He further told court he did not know the claimant was expectant and was admitted in hospital due to premature labour. Claimant did not send her husband to inform him that she was admitted in hospital. Claimant was terminated for negligence as she was quoting prices that were not accurate and was notified of that. The witness said that the claimant was issued with several warning letters but there was no change in her behaviour.
13. On cross examination he said that he did not remember if he gave the claimant an appointment letter. He paid the claimant Ksh 40,000/= and documents in court were petty cash and salary vouchers. He also said that he gave the claimant warning letters which were not in court record and he said he did not give her notice as she did not report to work. The termination letter to the claimant was received by David Wachira and not the claimant. He said he made no payment to claimant after she left employment. He said that the claimant was terminated because of negligence. On re-examination the witness said that the letter was received by one David who was sent by the claimant to receive the letter.

Claimant's written submissions

14. The claimant's submissions are mainly on the entitlement to the reliefs in the memorandum of claim.
15. She has submitted briefly on the issue of discrimination that the Respondent did not apply law equally to her but discriminated against her in terminating her employment. The Applicant seeks to rely on the authority of *GMV v Bank of Africa Ltd* eKLR where she submits it was held that 'Pregnancy discrimination implicates violation of multiple fundamental rights under the constitution including: the right to have equal opportunity in economic and social sphere, right of fair labour practices, right of inherent dignity and right to have a family.'
16. I was not able to find the Respondent's submission in the file and in the CTS platform.

Issues for Determination

- a. Whether the claimant was an employee or independent contractor of the respondent.
 - b. Whether the claimant was unfairly dismissed from employment
 - c. The remedies, if any, the claimant is entitled
17. The first issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent. Section 2 of the *Employment Act*, 2007 defines an employee as: "a person employed for wages or a salary and includes an apprentice and indentured learner." The employer pursuant to the section is "any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual" A contract of service is defined as: "an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learner ship.
 18. The question then is whether the claimant was an employee within the meaning of section 2 of the *Employment Act* 2007.
 19. In *Everette Aviation Limited v the Kenya Revenue Authority* [2013] eKLR, it was held that:

"In determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive. In my view, the fundamental



behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.”

20. The documents produced as exhibits in the file inter alia are payment vouchers from the respondent’s firm which indicate the claimant was being paid Kshs 40,000 which was being described as basic pay. There was consistent pay of Kshs 40,000 and was described basic as pay. This can only lead to the conclusion that indeed the claimant was an employee of the respondent who was earning a monthly pay.
21. Section 2 of the [employment act](#) 2007 on definitions defines an employee as follows:-

“Employee means a person employed for wages or a salary and includes an apprentice and indentured learner.”
22. To buttress the above the court noted a letter written by the respondent on 14th September 2016 addressed to the Ministry of East Africa Community labour and social protection where the respondent stated:-

“We wish to bring your attention to the above person who was employed as a sales representative on commission basis.”
23. There is no denial even from the respondent that the claimant was employed by Halifax estate Agency Limited and the said respondent says they were paying the claimant a retainer of Kshs 40,000/- per month.
24. The court would find from the evidence on record that the claimant was an employee of the respondent and so that donates jurisdiction to this court to deal with this matter as laid out in section 12 of [Labour Relations Court Act](#).
25. The other issue now is to determine if claimant was un fairly terminated or she absconded from her job? Section 47 (5) of the [Employment Act](#), 2007 requires of the claimant to bring out a case of unfair termination of employment to which the Respondent shall adduce evidence in justification.
26. 45 (4) (b) of the [Employment Act](#), 2007 provides that:

“Termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employee.”
27. In [Walter Ogal Anuro v Teachers Service Commission](#) [2013] eKLR the court held that:

“for termination to pass the fairness test, there must be both substantive justification and procedural fairness and that substantive fairness has got to do with the establishment of a valid reason for termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
28. In terms of section 43 of the [Employment Act](#), an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken.



29. On the application of section 47(5), the court in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR held that:

“The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination.

In *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, “Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”

30. In the Court of Appeal decision in the case of *Ken freight (EA) Limited v Benson K. Nguti* [2016] eKLR, held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure ...”

31. There was no hearing done before the decision to terminate the claimant was taken. Without hearing, there is no proof of the grounds of termination. The claimant having explained that the one instance where she underquoted price was a settled matter, the Respondent should have demonstrated how it came to use the issue as ground for termination. The letter of termination itself is general and does not state precisely which act of negligence the Respondent used to terminate the claimant. And it is not apparent whether the said acts of negligence were the genuine reason the respondent used to terminate the claimant as in the letter to the Labour office the director only mentioned the issue of failing to report to work. The act of negligence as per the undisputed evidence of the claimant had been settled and took place fairly long before the abrupt termination.
32. The court therefore further finds that the termination is unexplainable other than on the basis of her pregnancy as claimed by the claimant. The court finds and declares that the respondent violated sections 45 of the *Employment Act*, 2007 as read with article 27 of the *Constitution* of Kenya 2010 for terminating the employment of the petitioner without a valid reason. The conduct by the respondent was unfair, and unlawful.
33. The termination letter served on the claimant and dated 27th July 2016 the respondent gave the following reasons for termination of her employment:
- (a) Mised clients by underquoting the price of property which it was alleged she quoted Ksh 28,000,000 but the price was higher.
 - (b) She was also accused of failing to assist a client to sell her property and so tarnished the image of the company. Her services were terminated with immediate effect.
34. It was also quoted by the respondent by his letter dated 14th September 2016 addressed to the Ministry of East Africa Community, Labour and social security that claimant failed to report to work for the first week of July 2016.



35. If claimant absconded work the court notes the same was not raised in the letter of termination.
36. The respondent does not seem to be clear what reasons necessitated the termination of claimant's from their employment.
37. Even the reasons given in the letter of termination are vague and unsubstantiated. The dates, names and particulars of the property she is accused of having underquoted are not specified. The client she is accused of having failed to contact is not substantiated. The test of providing a valid reason by employer for dismissing an employee has not passed the test.
38. In any case the respondent did not invite the claimant for a disciplinary hearing in the presence of a fellow witness of her choice or a fellow union representative as well laid down in section 41 of the Employment Act. Section 41 of the employment act is in mandatory terms and the employer is not given a choice whether to follow it or not. It has to be followed.
39. There is the aspect raised by the claimant that she was terminated because she was pregnant. The respondent maintains he was not aware the claimant was even pregnant. The proof of discrimination is scientific and there has to be evidence to prove the same. The court has not found evidence that the termination was due to the fact that she was pregnant. There is evidence the claimant was unlawfully and wrongfully terminated but discrimination on the fact that she was pregnant was not proved.
40. The court having considered the pleadings, submissions and statutory law and authorities is well convinced the claimant was unfairly and wrongfully terminated from her employment and the respondent is therefore condemned to compensate.

Remedies

41. There was no notice or payment *in lieu* of notice given prior to the termination. The dismissal was therefore substantively and procedurally unfair within sections 41, 43 and 45 of the Employment Act 2007. She is awarded one month salary *in lieu* of notice being Kshs 40,000/-.
42. The claimant is entitled to compensation for the job loss in terms of section 49(1) (c) and (4) of the Employment Act, 2007 and for wrongful termination and so she is awarded three (3) months' gross salary compensation $40,000 \times 3 = \text{Ksh } 120,000$.
43. She is also awarded the unpaid salary for 22 days $\text{Ksh } 29,333.33/=$
44. Maternity leave at $\text{Kshs } 40,000 \times 3 = \text{Ksh } 120,000.00/=$.
45. Total award amounts to $\text{Kshs } 309,333.33/-$
46. Costs follow the event and so claimant is awarded costs and interest on her award at court rates for the date of judgment till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF MARCH 2023.

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 15th March 2020 and subsequent directions of 21st 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

