



**Nyangendo v Road Focus Consulting Limited (Cause E002 of 2021)
[2023] KEELRC 812 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 812 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E002 OF 2021
M MBARÚ, J
MARCH 27, 2023**

BETWEEN

JOYCE WARUGURU NYANGENDO CLAIMANT

AND

ROAD FOCUS CONSULTING LIMITED RESPONDENT

JUDGMENT

- 1 The claimant is an adult female. The respondent is a limited company who on employed the claimant on 20th June, 2016 as a project accountant and administrator and who worked until May, 2018.
- 2 The claim is that the claimant’s employment was unfairly terminated on account of pregnancy without notice or any notice of redundancy or any justified reasons. The claimant’s case is that she was discriminated against by the respondent contrary to article 27 of *the Constitution* read together with section 5 of the *Employment Act*. the respondent placed the claimant as a disadvantage for being a pregnant woman and targeted her for termination of employment. the selection criteria used to terminate employment was discriminatory, irrational and without due process.
- 3 The claim is also that employment terminated unfairly and the claimant is seeking the following;
 - a. Notice pay Kshs. 80,000;
 - b. Severance pay Kshs. 40,000;
 - c. Underpayments of dues Kshs. 440,000;
 - d. 12 months’ compensation Kshs. 960,000;
 - e. General damages for discrimination on grounds of pregnancy Kshs. 1,520,000; and
 - f. Costs of the suit.



- 4 The claimant testified in support of her case that upon employment, her salary was stated to be Kshs. 60,000 s basic pay and NSSF and NHIF would be remitted with a gross pay of Kshs. 80,000 but the respondent failed to remit the statutory dues as required.
- 5 The claimant worked for a year and one month and in May, 2018 her employment was terminated on account of being pregnant when the head of human resource Margaret Irungu summoned her and indicated that the claimant was no longer required to work and was only paid for one month and nothing else in terminal dues.
- 6 The claimant testified that she has a Bachelor degree in Supply and Procurement and management and a certificate in secretarial. She was appointed as administrative human resource but was later moved to Tumaini Supermarket for stocks taking. She was not appraised or assessed but the human resource manager called her on 21st May, 2018 and said that the claimant had failed in her duties. At the time the claimant was 8 months pregnant with the due date being June, 2018 and the termination of employment was without any good cause and based on the fact that she was pregnant and was only paid for a month and nothing else. The letter filed for clearance is not signed and the alleged letter of 14th May, 2018 was never issued. No letter terminating employment was issued or served upon the claimant. The orders sought should issue.
- 7, Upon cross-examination, the claimant testified that her degree was a certificate in business management and supply chain and the contract of employment was for a position of Project accountant and the basic requirements for the position was in accounting or finance and accounts which differed with the degree in supply and procurement. She coped well with the position and there was no evaluation or assessment. There were no consultations before placement in stocks taking or in taking a lower salary or a notice to show cause over any misconduct.
8. The claimant also testified that the position she was employed for required one to have a degree in accounts which she did not have and her degree was in supply and procurement. The claimant was supervised by Samuel Karugu and never noted any poor performance of employment duties and no notice to show cause issued.
9. While the claimant was in accounts department, the supervisor was James Waweru who was guiding her in her duties and she was moved to stock taking department from February, 2018 and at the time she was 4 months pregnant. She had meant to apply for maternity leave but her employment was terminated before doing so.
- 10 In response, the respondent's case is that the claimant was employed from 20th June, 2016 as a project accountant administrator until May, 2018 when her employment was terminated lawfully under her terms and conditions of contract and the *Employment Act*. the claimant was frequently unable to meet the demands of her job a fact that led to question into her qualification papers by being humane, the claimant was afforded a second chance and moved to a different docket to find her a placement that was suitable to her.
11. The response is also that the claimant's performance in her new docket was evaluated and she was still found to be far below average and her work unsatisfactory. Repeat assessments also found that the claimant failed to meet target and was due to be issued with a show cause notice leading to termination of employment on account of non-performance but the claimant failed to address as directed. It was just a coincidence that the claimant was pregnant at the time. there was no discrimination as alleged.
12. The claimant had trained as a procurement officer and was unable to perform her work despite being given numerous chances in various dockets to assist her keep her job. A candid discussion was held



with the claimant with regard to her performance and her qualifications and it was mutually agreed to reduce her salary to reflect her new docket and job description. The mutual agreement was to have the claimant as a stock audit clerk whereas she had started as the project accountant and administrator and she was satisfied with the changes and the when a show cause issued, the claimant failed to take heed and has failed to clear with the respondent so as to be paid her terminal dues and for absconding duty, employment terminated under the provisions of Section 44(4)(a) of the Employment Act and the claims made should be dismissed with costs.

13. In evidence, the respondent called Margaret Irungu the human resource and administrative manager who reiterated the response and also testified that the claimant was unable to undertake her duties and a notice to show cause issued which she refused to accept. She was given 48 hours to sign the notice but she refused to sign it.
14. Ms Irungu testified that in the contract of employment, the claimant's salary was Kshs. 80,000 which salary was all inclusive and it was noted that she did not fit in her role and job description and the parties mutually agreed to reduce the salary.
15. The claimant remained in the accounts department for 10 days only because she could not fit. A client wanted stock taking and the claimant was placed to do data entry but still could not manage the role and was re-assigned to Tumaini Supermarket in her area of expertise but still did not cope with the work requirements.
16. At the close of the hearing, both parties filed written submissions which are put into account.

Determination

17. In a letter dated 20th June, 2016 the respondent employed the claimant as the Project Accountant and Administration a contract for one year as a salary of Kshs. 80,000 and the job description was outlined. This letter is signed by Margaret Irungu the Human Resource and Administration.
18. The court takes it that the respondent required an employee for the position of Project Accountant and Administration and the claimant was employed on good basis for such position signified by the *Employment Contract* issued to her with a job description by non-other but the officer in charge of human resource and administration, Margaret Irungu.
- 19/ Pursuant to Section 13 read together with Section 10(5) of the Employment Act, 2007 (the Act) such contract could only change, reviewed, revised with the written consent and approval of the claimant. Section 10(5) requires that;
 5. Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
20. In the case of *Anthony v Communications Authority of Kenya & 3 others* (Petition E161 of 2021) [2022] KEELRC 1117 (KLR) (25 January 2022) (Judgment) the court held that;

Section 10(5) of the Employment Act, 2007 required that any change to the employment contract be made in consultation with the subject and affected employee and upon the revision of the contract of service, it had to be done in writing and the subject employee(s) must signify his/her consent to the change/revision. In the instant case, where indeed the respondent had made changes, revised and or reviewed the terms and conditions of employment of any employee, there was need for interrogation as to whether written consent and approval was obtained and if so, whether the subject employee was aggrieved



by any matter and if not, the matter must rest as the consent entered into in any other matter between another employee(s) and the CAK had to be looked at in its own merits. Employment was personal and specific and every employment contract had to be addressed on its terms and conditions.

Section 13(1) of the Act requires that;

1. If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.
21. It is therefore the duty of the employer to document any changes to the employment contract that is material and affecting the employee, issue the same in writing and cause the employee to execute in agreement.
22. In this case, without any matter or evidence produced with regard to any changes to the employment contract issued to the claimant with regard to changes in the employment particulars and salary changes. The terms agreed upon on 20th June, 2016 stand.
23. The claimed salary underpayments are therefore due as claimed at Kshs. 440,000.
24. The response is that the claimant was unable to perform her duties properly on the grounds she did not fit into the position allocated and hence was re-assigned duties and still failed to perform in her new allocations. The finding above with regard to employment and changes all go back to the employment contract issued by the respondent.
25. Where the respondent failed to interrogate the claimant in her background qualifications and proceeded to issue her with an employment contract in a position she was not suited for, blame cannot be on the claimant but the respondent. Employment was at the instance of the respondent and where the claimant was found to be of poor performance, the motions of Section 41 of the Act required that she be issued with notice of such matter and allowed to address and where this failed to be put under the performance plan and given time to address and only then would such matter be subject to a disciplinary process.
26. In the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR the court held that;

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer
27. In the case of *Kosgei v Metkei Multi-Purpose Company Limited (Civil Appeal 95 of 2017)* [2021] KECA 140 (KLR) (19 November 2021) (Judgment) the court held that before terminating an employee on grounds of misconduct, poor performance or physical incapacity the employer must explain to the employee in a language she understands the reasons for which the employer is considering to terminate employment.



28. In this case, the notice to show cause filed by the respondent and dated 14th May, 2018 is not received by the claimant. The evidence that the claimant refused to sign this letter is not followed up with any other notice as required under Section 44(4) (e) of the Act.
29. There is no notice terminating employment that was issued. It is not indicated that the claimant absconded duty after the alleged notice to show cause issued.
30. Even if the claimant absconded duty, which is not the case here, the duty vested upon the respondent as the employer to address such matter and bring employment to a closure. To leave the matter pending only acts to the detriment of the respondent as held in *James Okeyo v Maskant Flower Limited* [2015] eKLR that;
- ... the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.
31. The court finds employment terminated without the due process and pursuant to Section 45 of the Act, such was unlawful and unfair.
32. The claimant's case is also that she was discriminated against contrary to Article 27 of *the Constitution* read together with Section 5 of the Act on the grounds of being pregnant.
33. What is clear to the court is that the claimant was employed by the respondent in a position she did not fit since her qualifications were one thing and the position allocated required something different. To address such matter, tough belatedly and after a contract of employment had issued, the claimant was reassigned duties and she admitted that indeed when she was placed at Tumaini Supermarket, she felt well suited in her area of expertise.
34. With regard to her pregnancy, this matter was not formally brought to the attention of the respondent and it cannot be assumed that due to the matters of job placement and readjustments taken to have the claimant fit on the job were done to discriminate against her. to take such an approach would be for the claimant to lose sight of the fact that employment started on the wrong footing from the word go. Despite such misapplication and placement being done by the respondent and for which the court has addressed above, the matter of discrimination against the claimant cannot be discerned from the evidence submitted.
36. On the claims made, underpayments are hereby awarded as claimed at Ksh. 440,000. On notice pay, the claimant testified that she was paid for one month.
37. On the claim for severance pay, such only arise in a case of redundancy and this did not stand out as one such case.
38. On the findings that employment terminated unlawfully and unfairly, the claimant worked for slightly over a year and an award of one month pay at Ksh. 80,000 is hereby found appropriate.
39. A certificate of Service should issue in terms of Section 51 of the Act for the entire period of employment and upon the claimant undertaking clearance and upon which if there are any unpaid dues based on the shop floor practice should be addressed.
40. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. Compensation Ksh. 80,000;
 - b. Underpayments Ksh. 440,000;



- c. The claimant shall undertake clearance and be issued with the Certificate of Service in accordance with Section 51 of the *Employment Act*, 2007;
- d. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

