



REPUBLIC OF KENYA



**Wilson v Imarisha Mabati Limited (Appeal E023 of 2021)  
[2023] KEELRC 573 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 573 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E023 OF 2021  
CN BAARI, J  
MARCH 9, 2023**

**BETWEEN**

**MARY KAVINDU WILSON ..... APPELLANT**

**AND**

**IMARISHA MABATI LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. W.K. Onkunya  
(SRM) delivered on 16th June, 2021 in Kisumu CMELRC NO. 413 OF 2019)*

**JUDGMENT**

1. This appeal arises from a Judgment rendered on 16<sup>th</sup> June, 2021, where the Trial Court found in favour of the Appellant herein. The Trial Court made a declaration that the termination of the Appellant's probationary contract was unfair and unlawful. The Court proceeded to award the Appellant two months' salary as compensation for the unfair termination, costs of the suit and interest thereon.
2. The Appellant being aggrieved by the decision of the Trial Court on the award of two months' salary in compensation, and the failure to award her damages for discrimination based on pregnancy, lodged this appeal on 28<sup>th</sup> June, 2021.
3. The appeal is premised on the grounds that:
  - i. The Trial Court erred in law and fact in finding that the Appellant was on probationary contract.
  - ii. The Trial Court erred in fact and law in finding that the Appellant was unfairly terminated yet only awarded the Claimant an equivalent of 2 month's salary in damages for unfair termination.



- iii. The Trial Court erred in law and fact by finding that the termination was discriminatory yet failed to award the Appellant any damages.
  - iv. The Trial Court failed to consider the submissions that were filed by the Appellant.
  - v. The Trial Court erred in law and fact by considering issues that were not controverted by the Respondent who chose not to defend the cause.
4. Parties canvassed the appeal through written submissions. Submissions were filed for both parties.

### **The Appellant's Submissions**

5. The Appellant submits that she was unfairly terminated on the ground of pregnancy. The Appellant further submits that the Respondent's claim that she failed to perform her duties as required, yet failed to evaluate her capabilities is a cause for concerns.
6. The Appellant further submits that although the Respondent has alleged that it terminated her services for non-performance, her termination letter does not reveal any reasons for the termination.
7. It is submitted for the Appellant that no evidence has been led to show that the Respondent accorded the Appellant an opportunity to be heard, and that the reasons for termination were neither given nor proved.
8. The Appellant submits that the Respondent terminated her services unfairly and discriminatively, having terminated her when she had just returned from her maternity leave which is a clear show that the decision was pre-determined.
9. The Appellant further submits that her termination did not adhere to the requirements of Section 41 of the [Employment Act](#) 2007.
10. The Appellant submits that the Respondent purported to terminate the Appellant's probationary contract, yet treated her as an employee on permanent basis whilst paying her final dues;

### **The Respondent's Submissions**

11. The Respondent submits that the Trial Court correctly found that the Appellant had worked on probationary terms.
12. It is the Respondent's submission that it is not disputed that upon expiry of the first probationary contract, the Respondent and the Appellant agreed to extend it in a meeting held before she proceeded on maternity leave.
13. The Respondent further submits that by the Appellant reporting to work after maternity leave on 18<sup>th</sup> February, 2019, and failing to dispute the email sent on 6<sup>th</sup> March, 2019, reminding her about the extended probation, and continuing to draw a salary in the same role, the Appellant acquiesced to the extension of the probation.
14. It is the Respondent's submission that although the Appellant acknowledged having received, perused, and accepted the policies and terms contained in the Manual, she chose not to exhibit the acknowledgment.
15. The Respondent further submits that it complied with Section 42 of the [Employment Act](#) when it terminated the Appellant's probationary contract on the basis that the letter of termination dated 29/3/2019 contains a 7-days' notice as required by law. The Respondent sought to rely in [Meru Multi-Purpose Co-operative Society Limited v Jeremy Kirimi](#) [2022] eKLR to buttress this position.



16. The Respondent submits that the Appellant was terminated on valid grounds in light of Section 43 and 45 of the Employment Act No. 11 of 2007. It is their submission that it genuinely and generally believed that it could not retain the Appellant because of her poor performance.
17. The Respondent submits that by virtue of the probation, the Appellant did not have an expectation of permanent employment, and that the lower court erred in failing to find that the termination was fair and lawful.
18. It is the Respondent's further submission that the Appellant is not entitled to service pay, having worked on probationary terms for a period not exceeding one (1) year, for reason that Section 35(5) exempts employees who have worked for under one (1) year from receiving service pay.
19. The Respondent submits that the Appellant failed to prove any element of discrimination. It is their further submission that the Appellant was not terminated on account of pregnancy, but was instead, granted a paid maternity leave and should not be allowed to rely on pregnancy to seek compensation, as she was terminated after the maternity leave and not before. The Respondent had reliance in Simon N. Mwaniki & 25 others v Permanent Secretary Ministry of Defense & 3 others [2018] eKLR to support this position.
20. The Respondent submits that two month's salary was adequate remedy for unfair termination, which is disputed, considering the period served and the fact that the Respondent already paid salary in lieu of notice despite having issued a valid seven-day notice.
21. The Respondent finally urge that the Court varies the Judgment of the Lower Court, and find that the termination of the Appellant's probationary contract was fair and lawful, and further reduce the damages of 2-months' salary awarded to the Appellant.

### **Analysis and Determination**

22. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into the following two grounds: -
  - a. That the Learned Magistrate erred in awarding the Appellant two months' salary in compensation for the unfair termination
  - b. That the Learned Magistrate erred in failing to award the Appellant damages for discrimination.
23. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, while handling a first appeal from the High Court, the Court of Appeal held that:
 

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”
24. The Trial Court found the termination of the Appellant herein unfair and unlawful on account of failure of the Respondent to accord the Appellant fair procedure and valid reasons for the termination. The Trial court then proceeded to award the Appellant two months' salary for the unfair termination and costs of the suit.
25. The Appellant was employed on 14<sup>th</sup> May, 2018, and placed on a six months' probation. Just when her probationary period came to the end, she proceeded on maternity leave and resumed duty on 18<sup>th</sup>



- February, 2019. The Respondent's case is that it extended the Appellant's probation for a further six months, and which according to the Respondent, was to end on 15<sup>th</sup> May, 2019, but was terminated on 29<sup>th</sup> March, 2019.
26. The Appellant denies notice of extension of her probationary contract and the email said to have been written in respect of the extension was not availed before court. The Respondent's reason for terminating the services of the Appellant is poor performance, but which reason was not stated in the termination letter.
  27. It is a requirement of the law that for one to be terminated/dismissed on the ground of performance, the employer is placed at a high level of proof, to show that in arriving at the decision, they had put in place a policy or practice on how to measure good performance as against poor performance. (See [Jane Samba Mukala v Oltukai Lodge Limited-Industrial](#) Cause No. 823 of 2010).
  28. The question is whether an employee on probation is entitled to fair process. Section 42 of the [Employment Act](#), entitles an employee on probation to a seven (7) days' notice of termination. Section 45(1) and (2) of the [Employment Act](#) on the other hand, entitles an employee a right not to be unfairly terminated, and which right in my view, cannot be abrogated for reason only that the employee is serving on probation.
  29. The Appellant herein denies having been on probation and contends that she had done her six months of probation as at the time she proceeded on maternity leave. She further contends that the terminal dues paid to her upon termination, were calculated as if she was on permanent and pensionable service.
  30. It is not disputed that the Appellant had done six months as at the time of her maternity leave. Further, the Respondent's contention that the Appellant's probationary period was extended was not proved, as the email said to have communicated the extension, was not produced before court, and neither did the Appellant admit the purported oral discussion on the extension.
  31. To this end, I find that the Appellant's contract was not probationary, and further hold that she was entitled to both procedural fairness and substantive reasons for termination and which were not given.
  32. I proceed to uphold the Trial Court's holding that the Appellant's termination is unfair and unlawful.
  33. The Appellant asserted that the Trial Court erred in awarding her two month's salary in compensation for the unfair termination, and seeks that this Court awards her twelve (12) months salary as compensation for the unfair termination.
  34. In [Alphonse Maghanga Mwachanya v Operation 680 Limited](#) [2013] eKLR the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the [Employment Act](#) and awarded the Claimant who had served for 2 years, 12 months' compensation. This position was upheld in [Kenya Ports Authority v Festus Kipkorir Kiprotich](#) [2014] eKLR where the court held that the measures of compensation should be guided by the statutory capping at the time of termination.
  35. Further, in [Kenfreight \(E.A.\) Limited v Benson K.Nguti](#) [2016] eKLR, the Supreme Court's observed that the [Employment Act](#) provides for a number of remedies for unlawful or wrongful termination under Section 49, and that it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.
  36. The Trial Court in making an award of two months' salary, based the award on the Appellant's time in the service of the Respondent. This being a discretionary power of the court, I find no reason to set



- aside, or otherwise interfere with this award, and I thus uphold the Appellants award of two months' salary as compensation for the unfair termination.
37. The Trial court has held that the Appellant was discriminated upon on account of pregnancy. The Respondent denied terminating the services of the Appellant on the basis of pregnancy and contends instead, that it terminated the Appellant upon her return to duty on completion of her maternity leave, and hence the termination was not based on the pregnancy.
  38. The Appellant was terminated one month after her return from her maternity leave. No reason(s) were given for the termination. The Respondent's position is that it was facing financial difficulties and hence the decision to lay off some of her employees. No evidence was led to show that anyone else was terminated at the time the Appellant was terminated.
  39. The Appellant's evidence is that someone else was employed in her position as soon as she was terminated. I would thus agree with the Appellant that the termination was pre-determined, and that the same was premised on the ground of the Appellant's pregnancy as no prove of poor performance or any other reason for the termination was placed before this Court.
  40. In *Claudine Wanjiku Mboce v Exxon Investment Limited & another* Cause No. 619 of 2015, Rika J held that the Respondent violated the Claimant's right not to be directly or indirectly discriminated against on account of her pregnancy.
  41. I thus uphold the Trial Court's finding that the Appellant's termination was on account of her pregnancy, and hence a violation of her Constitutional right enshrined in Article 27 of the *Constitution*.
  42. The Trial Court did not make an award for the discrimination, even after finding that the Appellant was discriminated upon. In this regard, I award the Appellant Kshs. 500,000/- as damages for discrimination.
  43. In whole, I make orders as follows: -
    - i. That the Trial Court's finding that the Appellant was unfairly terminated is upheld.
    - ii. That the Trial Court's award of 2 months' salary as compensation for unfair termination is upheld.
    - iii. An award of Kshs. 500,000/- in damages for discrimination.
    - iv. The Respondent will bear the costs of the appeal.
  44. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Kisaka present for the Appellant

Mr. Nyboma present for the Respondent

