



Benjamin v Ministry of Labour & 5 others; Senate (Interested Party) (Petition E001 of 2022) [2023] KEELRC 1439 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1439 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E001 OF 2022
SC RUTTO, J
MAY 31, 2023
IN THE MATTER OF ON UNEQUAL DURATION MATERNITY AND
PATERNITY LEAVES
AND
IN THE MATTER OF SECTION 5 AND 29 OF EMPLOYMENT ACT 2007
(REV.2012)
AND
IN THE MATTER OF CHILDREN ACT, 2001
AND
IN THE MATTER OF VIOLATION OF THE RIGHT TO NON-
DISCRIMINATION
AND
IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 27, 28 AND
41, 43, 53 OF THE CONSTITUTION OF KENYA (2010)

BETWEEN

DR MAGARE GIKENYI J BENJAMIN PETITIONER

AND

MINISTRY OF LABOUR 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

FEDERATION OF KENYAN EMPLOYERS (FKE) 3RD RESPONDENT

CENTRAL ORGANISATION OF TRADE UNIONS (COTU) 4TH RESPONDENT

TRADE UNIONS CONGRESS OF KENYA (TUC-KE) 5TH RESPONDENT



AND

JUDGMENT

1. The Petitioner Dr. Magare Gikenyi J, Benjamin describes himself as a Consultant Trauma and General Surgeon working for the County Government of Nakuru, at Nakuru Level 5 Hospital.
2. The gist of Dr. Magare's Petition is to declare Section 29 of the Employment Act, 2007 unconstitutional in so far as it grants different durations of maternity and paternity leave to female and male employees. He has further termed the said Section 29 as discriminatory contrary to Article 27 of the Constitution hence avers that the same is unconstitutional and therefore invalid, null and void *ab initio*.
3. According to Dr. Magare, the said differentiation of duration of maternity and paternity leave is not fair a differentiation. He contends that according to the Constitution, both men and women are equal before the law and Article 27 prohibits discrimination of any form.
4. The Petitioner further states that in modern everyday work, both men and women have equal opportunities of being employed and both parents are supposed to take care of the child for his/her normal growth and development. It is his case that Section 29 assumes that the father has no role or has a very limited role in child development, the assumption of which has no scientific, moral and societal facts. He further avers that failure to accord a father equal paternity leave as the mother is both unfair and discriminatory to the father and the newborn child.
5. The Petitioner further avers that the aforesaid differentiation of durations of maternity and paternity leave assumes that pregnancy is a disease, while in actual fact, although pregnancy can have complications, it is in itself a normal physiological process like breathing, blood circulation, menstruation, support and movement/locomotion among others.
6. He further contends that due to absence of the father during the critical first 3 months period as their counterpart (mothers) denies them opportunity to bond with their child right from the onset and this gives rise to fathers being disowned late in life when children choose mothers over fathers in old age.
7. Dr. Magare further states that through the said Section 29, women have directly and indirectly been discriminated in that Kenya being a capitalist state, employers have shied away from employing female employees. According to him, there would be no discrimination if the duration of maternity and paternity leave was the same.
8. It is in light of the foregoing that the Petitioner seeks the following reliefs: -
 - a. A Declaration that section 29 of the Employment Act 2007 as far as it gives different duration of maternity and paternity leaves is unconstitutional and therefore, invalid, null and void *ab initio*.
 - b. A Declaration that section 29 of the Employment Act is discriminatory contrary to article 27 of the constitution in as far as it gives different duration of maternity and paternity leaves.



- c. A Declaration that section 29 of the *Employment Act* entrenches unfair labour practices, indignities the male employer in as far as it gives different duration of maternity and paternity leaves and denies the child maximum parental care contrary to *inter alia* article 28, 41 and 53 of the constitution and section 6 of the *children Act*.
- d. An Order that paternity leave is 3 months duration same as maternity leave, until stakeholders engagement or amendment by parliament whichever comes early.
- e. An Order of judicial review by way of mandamus, compelling the petitioner and Respondents to hold a stakeholders engagement with a view of finding/ determining an appropriate duration of paternity and maternity leaves which should be equal to another.
- f. A Declaration that children born in both monogamous and polygamous family setups have *inter alia* same parental protections, care and benefits.
- g. An Order to all employers, employment organs, state and non-state actors and all persons to correct this anomaly of unequal parental leave duration in their place of work or their policy documents including (but not limited to) human resource policies and procedures manual for the public service, 2016.
- h. That any other order or modification of petitioner's prayer(s) which this honourable court may deem fit to give to a achieve objects of justice for majority of Kenyans.
- i. Costs of this Petition to be borne by respondents.

Respondent's case

9. The Respondents opposed the Petition through a Replying Affidavit sworn by Ms. Florence Bore, the Cabinet Secretary, Ministry of Labour & Social Protection, the 1st Respondent herein.
10. Ms. Bore avers that Section 29 of the *Employment Act* provides that the duration of paternity leave of 2 weeks with full pay allows the father to have time with the mother and the new born for 2 weeks and release him to go and do the bread winning duties of a man. She further states that the man is the provider in many family settings and cannot cite discrimination.
11. She avers that Section 29 was enacted by Parliament after widespread public consultations and stakeholder engagement that took several years involving the public, Trade Unions, National Treasury and Planning, Ministries, Attorney General, Social partners and the International Labour Organization who acted as the technical advisor. According to her, the change in the law to include paternity leave for men was a big boost to the labour movement in Kenya that brought a fundamental change in the face of labour relations by enhancing labour rights.
12. Ms. Bore further states that the purpose of paternity leave is to allow an eligible staff member a period of paid leave to bond and take care of his newly born child. She avers that most employers expect men to apply for their paternity leave within the spouse's maternity leave.
13. She further states that the 3 months maternity leave to women after giving birth is a period set aside in law to enable the mother of a child to get ample rest to breastfeed the baby after a grueling 9 months pregnancy. She contends that the mother of a child needs more time to bond with her child and further



requires ample time for recuperation after birth, to heal and so that her body can reset. According to her, men do not carry pregnancy and do not breastfeed and that the child does not require its father in the formative stages.

14. Ms. Bore further avers that to accord a man a 3 months sabbatical leave after the birth of a child, will work against many employers who have a heavy burden of shouldering the absence of child-bearing women, meaning that employers must also incur the extra cost of having a replacement in the intervening period over and above paying full pay to a man to stay at home doing menial jobs.
15. She further states that most companies are resorting to capital intensive techniques of production to avoid unnecessary and expensive lay-offs after giving men and women paternity and maternity leave after child birth. In this regard, she states that robots have been utilized which now pose a bigger threat to men who want extra time for paternity leave.
16. According to Ms. Bore, the main work of Governments the world over is to protect investments and to dissuade policies that discourage investments. That therefore, a 3 months paternity leave for men will adversely affect them and wreck families since companies and other employers may resort to layoffs to protect their investments, compounded further by the Covid-19 pandemic.
17. The Interested Parties did not participate in the proceedings.

The Petitioner's submissions

18. The Petitioner argued that the Respondents' public policy of discrimination of parental leave have been shown to be capricious, irrational and unreasonable with no objective scientific and/or medical facts. He further contends that the rule of law should be maintained and that while interpreting the Constitution, the same should be in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. On this score, he referred the Court to the case of *Institute of Social Accountability & Another vs National Assembly & 4 Others High Court*, (2015) eKLR.
19. It was the Petitioner's further submission that the Respondents' policy actions were outside the law hence the said actions are liable to be rectified by the Court through appropriate reliefs under Article 23 of the *Constitution*. He further submitted that the policy decisions of different parental leave fall in the second category of "whether the authority exercised its discretion properly", which in his view, the policy makers abused their discretion and were out rightly irrational. In support of this argument, the Petitioner invited the Court to consider the determination in the case of *Masai Mara (SOPA) Limited vs Narok County Government* [2016] eKLR.
20. The Petitioner further argued that mere differentiation does not amount to arbitrariness and the impairment of the fundamental dignity of a person, the simple reason being that it is generally impossible to regulate affairs of people without differentiation. It was his further submission that where the discrimination is found to be unfair, then a determination is to be made as to whether there can be any rational justification under Article 24 of the *Constitution* and on this score, he submitted that there was no rational justification for the same since both paternal and maternal leaves are parental leaves.
21. The Petitioner further argues that there was no rational justification for the different durations of leave. He further argues that the differential leaves affect children's cognitive development and bonding of the child with both parents and this is not in the best interests of a child.
22. The Petitioner stated in further submission that on account of Section 29 of the *Employment Act*, women have been directly and indirectly discriminated against in that Kenya being a capitalist state,



employers have shied away from employing female employees and have been mostly affected especially during redundancies.

23. Citing the case of *Oindi Zaippeline & 39 others v Karatina University & another* [2015] eKLR, the Petitioner further submitted that parents had a legitimate expectation of continuing with their work, getting equal parental leaves and not being discriminated by recruitment agents for being female or male.

The Respondent's submissions

24. On the part of the Respondents, it was submitted that Section 29 of the *Employment Act* is not unconstitutional as it was enacted by Parliament after widespread public consultations and stakeholder engagement that took several years. It was further submitted that Parliament consists of elected representatives of the people of Kenya and before the promulgation of the Constitution, any statute was deemed to have been approved by the general public especially if the key stakeholders were involved before enactment of any given law like in the instant case.
25. The Respondents stated in further submission that the Petitioner has not adduced any evidence that there was no public participation nor impugned the legislation process. It was further submitted that if the Petitioner had a problem with the Act, he should have invoked Article 119 of the *Constitution*. To this end, the Respondents argued that there is a presumption of constitutionality and therefore every statute enacted by Parliament enjoys this presumption. To buttress this argument, the Respondents placed reliance on the case of *Mark Ngaiwa vs Minister of State for Internal Security and Provincial Administrative & another* (2011) eKLR.
26. The Respondents further urged the Court to take judicial notice that granting male employees 3 months paternity leave is economically unsustainable in Kenya especially for private entities.

Analysis and Determination

27. Flowing from the Petition, the Response as well as the opposing submissions, the following issues stand out for determination: -
- a. Whether Section 29 of the *Employment Act*, 2007 offends Article 27 of the *Constitution* hence unconstitutional; and
 - b. Whether the Petitioner is entitled to the reliefs sought.

Whether Section 29 of the *Employment Act*, 2007 offends Article 27 of the Constitution hence unconstitutional

28. As stated herein, the gist of the Petitioner's case is that Section 29 of the *Employment Act*, 2007 is discriminatory against male employees in that it grants different durations of maternity and paternity leave.
29. To put the issue into context, I find it imperative to revisit the provisions of the said Section 29. Relevant to this case are subsections (1) and (8) which are couched as follows: -
- (1) A female employee shall be entitled to three months maternity leave with full pay.
 - (8) A male employee shall be entitled to two weeks paternity leave with full pay.
30. The statutory provisions which I have reproduced above are in respect of the maternity leave and paternity leave entitlement due to female and male employees.



31. It is that provision that the Petitioner has termed as discriminatory as it grants different durations of parental leave to female and male employees post child birth.
32. Article 27 of the Constitution which provides for equality and freedom from discrimination is expressed as follows: -
- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 - (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic collateral and social spheres.
 - (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause (4).
33. Essentially, Article 27 of the Constitution outlaws any form of discrimination on any ground. As to the definition of the term “discrimination”, the Black’s Law Dictionary, 9th Edition defines the same to mean “Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured.”
34. To put it succinctly, discrimination is unfair, prejudicial and unjustified treatment of a person on any ground for instance ethnicity, age, sex, or disability.
35. The pertinent question which must now be resolved is whether the different durations of parental leave assigned under Section 29 (1) and (8) of the Employment Act, 2007 offends Article 27 of the Constitution, hence discriminatory?
36. In *Harksen vs Lane NO and Others* (CCT9/97) [1997] ZACC 12, the Constitutional Court of South Africa in establishing the test to be applied in order to determine whether discrimination has occurred determined as follows:-

“At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (b)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics



which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).”

37. What I gather from the foregoing determination is that the first step of enquiry is to determine whether the provision in question differentiates between people or categories of people and if so, whether the differentiation bears a rational connection to a legitimate government purpose. Ultimately, the differentiation or unequal treatment ought to bear a rational connection to a legitimate purpose, and if it does not, then there is discrimination. The next and final step of enquiry involves a two stage analysis to determine whether the differentiation amounts to unfair discrimination. If, at the end of the enquiry, the differentiation is found to be unfair, then a further determination will have to be made as to whether the provision can be justified under the limitations provided for in the Constitution.
38. In light of the foregoing, it can very well be said that not every differentiation is discriminatory and unconstitutional. The ultimate test is whether the said differentiation is fair, justified and has a rational connection to a legitimate purpose.
39. As was held in the case of *Nelson Andayi Havi vs Law Society of Kenya & 3 others* [2018] eKLR: - [95]. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.
40. And further, in *Federation of Women Lawyers Fida Kenya & 5 Others vs Attorney General & another* 2011 eKLR, it was held as follows: -

“In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases”.



41. A similar position was taken by the Court of Appeal in the case of *Mohammed Abduba Dida vs Debate Media Limited & another* [2018] eKLR, thus: -

“From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by Article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose.”

42. Applying the above determinations, to the case herein, I do not find it reprehensible or for that fact unconstitutional and discriminatory for Section 29 of the *Employment Act* to assign different durations of parental leave to female and male employees post child birth. I say so because males and females differ due to a combination of genetic and hormonal factors. For this reason, male and female employees do not go through the same biological processes during both the prenatal and the post-natal stage. For instance, it is the female employee who carries a pregnancy, goes through the child birth process and eventually nurses the child after birth, whereas the male employees provide the necessary support to their spouses, to ease the entire process.

43. It therefore follows that female employees need more time post child birth to heal physically and nurse their young ones as compared to their male counterparts. For the foregoing reasons, the two categories of employees cannot be treated in a similar manner post child birth. Indeed, it is for this very reason and rightly so, that the drafters of the *Employment Act*, 2007, deemed it fit to assign different durations of maternity leave and paternity leave to female and male employees. It goes without saying that the differentiation bears a rational connection to a legitimate purpose.

44. As was held by the Court in *Federation of Women Lawyers Fida Kenya & 5 Others vs Attorney General & another* 2011 eKLR, equal protection does not prevent reasonable legislative classification and that the law of equality permits many practical inequalities. In my view, Section 29 of the *Employment Act*, 2007 is a perfect example where the reason for the differentiation is justified and reasonable.

45. I am further guided by the determination of the Supreme Court of Canada in the case of *Andrews vs Law Society of British Columbia* [1989] 1 S.C.R. 143, in which the principle of differentiation was amplified as follows: -

“It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s.15 of the Charter. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.”

46. In the instant case, I have not discerned any unreasonable, unfair or arbitrary differentiation under Section 29 of the *Employment Act*, 2007, that can be regarded as discriminatory against male employees. The Petitioner’s allegations to that extent are unfounded.

47. If anything, it is quite obvious why the drafters of the *Employment Act*, 2007 deemed it fit to categorize the male and female employees as it did and assigned durations of parental leave.



48. In my view, granting both female and male employees an equal duration of 3 months parental leave, will have high cost implications in the labour sector thus yielding undesirable results. It is worth pointing out that the Petitioner submitted that no employer enjoys paying an employee full salary when he/she is not producing goods/services in the business hence employers have resorted to employing more male employees due to longer maternity leave period as opposed to shorter paternity leave. Supposing the scenario painted by the Petitioner is true, wouldn't it be far worse if both categories of employees are given 3 months parental leave?
49. The Petitioner has further argued that female employees have been indirectly discriminated as employers have shied away from employing and retaining them. In this regard, he cited instances of redundancies adding that most female employees are affected. Despite this assertion, the Petitioner did not back up the same with statistics. In any event, the Constitution and the Employment Act have put in place safeguards to protect employees against any form of discrimination in the work place. Therefore, where such discrimination has been alleged and proved, the Courts have not hesitated to intervene and issue appropriate orders.
50. The total sum of my consideration is that Section 29 of the Employment Act, 2007 does not offend Article 27 of the Constitution in any manner hence is not discriminatory and is therefore not unconstitutional.
51. Accordingly, this Petition fails and is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 31st of May 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Petitioner No appearance

For the Respondents No appearance

For the Interested Parties No appearance

Court assistant Abdimalik Hussein

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 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.

