



Wakarima v Registered Trustees Catholic Archdiocese of Nyeri (Employment and Labour Relations Petition E008 of 2022) [2023] KEELRC 1272 (KLR) (19 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1272 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2022**

ON MAKAU, J

MAY 19, 2023

BETWEEN

AGNES NYAWIRA WAKARIMA PETITIONER

AND

**REGISTERED TRUSTEES CATHOLIC ARCHDIOCESE OF
NYERI RESPONDENT**

JUDGMENT

1. By a petition filed on October 14, 2022, the petitioner seeks the following reliefs:-
 - i. A declaration that the termination of the petitioner's employment violated her rights under articles 27 (1) (2) (3) (5), 28, 41 and 47 of the *Constitution of Kenya, 2010*.
 - ii. A declaration that the termination of employment was illegal, unlawful, unfair and inhumane and that the claimant is entitled to payment of her terminal dues in full.
 - iii. An order for the respondent to pay the petitioner her terminal dues as well as compensation particularized as follows
 - a. Compensation for unlawful termination- Kshs 11,000x12 Kshs 132,000.00
 - b. House allowance at Kshs 15%x11,000x12x5 Kshs 99,000.00
 - c. Annual leave Kshs 11,000.00
 - d. Service pay at Kshs 11,000x5 Kshs 55,000.00
 - e. Payment in lieu of notice Kshs 11,000.00Total Kshs 308,000.00
 - iv. General damages for discrimination based on pregnancy.



- v. Any other orders that the court may deem fit to grant.
2. The grounds upon which the said reliefs are sought are that the respondent discriminated the petitioner by terminating her permanent employment vide the letter dated June 30, 2022 while on her 90 days maternity leave. It is the petitioner's case that the termination was for the reason of her pregnancy. Further, that the termination was unfair and contrary to section 45 of the *Employment Act*.
3. The petition is supported by an affidavit which reiterates the petitioner's averment that her employment was terminated on account of pregnancy and was therefore discriminatory. She faulted the respondent for replacing her with one Esther Maina who held her brief during the maternity leave.
4. The respondent denied the alleged discriminatory and unfair termination of the petitioner's employment. It averred that it allowed the petitioner to continue working and even gave her maternity leave. Therefore it maintained that the allegations by the petitioner have no merits.
5. It further averred that it has a discretion to employ on basis of merits and denied that it terminated the petitioner's employment unlawfully as alleged. Finally it denied the reliefs sought by the petitioner including the claim for annual leave contending that teachers are known to go for their leave during school holidays.

Submissions

6. The petitioner submitted that there is evidence on record that she was employed by the respondent as a teacher including employment contract, a letter granting her to go on leave and letter terminating her employment.
7. She further submitted that the termination of her employment was substantively and procedurally unfair because it was not grounded on a valid and fair reason and the procedure followed was not fair. Reliance was placed on the case of *Pamela Nelima Lutta v Mumias Sugar Co Ltd* (2017 eKLR where the court held that the employer has the burden of proving valid reason and that fair procedure was followed. She submitted the termination letter cited unavoidable circumstances as the reason for the termination and condemned the petitioner unheard.
8. The petitioner further submitted that terminating her employment on ground of pregnancy violated her right under article 27 of the *Constitution* and section 5(3) of the *Employment Act* which prohibits discrimination against an employee on ground of pregnancy. She relied on the case of *GMV v Bank of Africa Kenya Limited* (2013) eKLR to urge that once an employee establishes a prima facie basis for the allegation of discrimination, the burden shifts to the employer to prove that the alleged discrimination was not factual.
9. She submitted that there is a nexus between the termination and the pregnancy because whereas there was opportunity for the respondent to terminate the contract after it lapsed, the respondent continued to employ her until she went on the maternity leave and then terminated her employment.
10. Further, she submitted that the termination was done in a most inhumane manner that the petitioner's dignity was shredded into pieces contrary to article 28 of the *Constitution*. The termination also violated her right to fair labour practices as enshrined under article 41 of the *Constitution*.
11. On the basis of the matters submitted above, the petitioner contended that she is entitled to the reliefs sought by the petition plus costs and interest.
12. On the other hand, the respondent submitted that although it concedes that there was a fixed term contract that expired in December 2021, the petitioner has not adduced any evidence to prove that



the said contract was extended. Further, that she did not adduce any evidence to prove that she was employed from 2017 to 2018 as she alleged.

13. As regards termination on account of discrimination, the respondent submitted that the petitioner did not offer any evidence to prove any nexus between the termination and her pregnancy. Relying on the *GMV* case, *supra*, the respondent submitted that the petitioner had not discharged the burden of proof in establishing discrimination on account of pregnancy.
14. On the contrary, it submitted how it upheld equality and did not practice any form of discrimination against the petitioner or any of its staff; that it allowed the petitioner to attend her duties while pregnant and when she sought for maternity leave, the same was allowed with pay for 90 days; and further that it offered her reasonable working condition during her pregnancy and at all times treated her with utmost dignity and respect. She also never raised any complaint during her employment, that she had been discriminated against or mistreated during her pregnancy or even after delivery. Therefore it was submitted that the alleged discrimination has no basis.
15. On the other hand, it was submitted that the termination of the claimant's employment was fair since she was given due notice of termination and payment for the notice period made. Further, that the petitioner has admitted in paragraph 12 of the petition that she was paid her salary for 7 months after the lapse of her contract in December, 2021. Reliance was placed on the case of *Trocaire v Catherine Wambui Karuno* (2018) eKLR where the Court of Appeal held that at the end of a fixed term contract, the employer has no obligation to justify termination on grounds beyond the lapse of the fixed period unless there is a clause in the contract justifying the termination.
16. Finally the respondent submitted that the claimant is not entitled to the reliefs sought including house allowance since she was getting a gross salary of Kshs 11,000.00.

Issues for Determination

17. Having considered the pleadings, evidence and submissions, I am satisfied that there existed an employer-employee relationship between the parties herein until the respondent terminated it vide its letter dated July 30, 2022. The issues for determination are:-
 - a. Whether the petition meets the competence threshold of a constitutional petition.
 - b. Whether the termination of the petitioner's employment violated her constitutional rights under article 27, 28, 41 and 47 of the *Constitution*.
 - c. Whether the termination was unfair and unlawful.
 - d. Whether the petitioner is entitled to the reliefs sought.

Competence threshold

18. In the case of *Anarita Karimi Njeru v Republic* (1979) eKLR the court held that:-

“...if a person is seeking redress from the High court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

19. The above principle has been affirmed by this court and Court of Appeal in a legion of decisions. Applying the said principle to the instant case, I find and hold that the petition meets the competence threshold required not only for the court to understand the dispute, but also for the opposing party to



understand the dispute and make a defence. The petitioner has pleaded the articles of the Constitution alleged to have been violated, and the manner in which they were allegedly violated, basically by terminating the claimant's contract of employment allegedly due to pregnancy, and without following a fair procedure. The respondent has made a comprehensive response to the alleged violation and argued its case.

Violation of Right to Article 27, 28, 41 and 47 of the Constitution

20. There is no dispute that the petitioner's employment was terminated while on her maternity leave. The termination letter read that:-

“Dear Agnes Nyawira

Ref: Maternity Leave

Received your letter dated 2/3/2022. We will grant you maternity leave from May 1, 2022 for 90 calendar days as per the contract. Due to unavoidable circumstances we will not be able to take you back to the school after the month of July, 2022 and we will pay your salary during the period of maternity leave.

Thanking you for your kind services to Holy Angels School...”

21. The letter shows a drastic decision based on unspecified reason, and one which was reached without according the petitioner any hearing. The timing of the decision and the circumstances in which the termination was made, led the petitioner to believe that she was discharged on account of pregnancy. Under section 46 of the Employment Act, terminating employment of an employee is unfair if grounded on pregnancy because it smacks of discrimination contrary to section 5 of the Act and article 27 of the Constitution. Further it amounts to violation of right to fair Labour Practices and fair administrative action contrary to article 41 and 47 of the Constitution as regulated under section 45 of the Employment Act.

Unfair Termination

22. Section 45 (1) and (2) of the Act provides that:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee's conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”

23. I have already made a finding of fact that the respondent did not explain the reason for the termination, and it never accorded her any hearing. The respondent contended that it served the petitioner with a



termination notice and paid salary during the notice period. However I hold the view that service of termination notice and payment of salary in lieu of notice does not disentitle an employee to know the reason for the termination and be accorded a fair hearing before the termination.

24. I gather support from the case of *Kenfreight (EA) Ltd v Benson K Nguti* where the Court of Appeal held that:-

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

25. Likewise in this case, I find and hold that the termination of the petitioner’s employment was also unfair and unlawful within the meaning of section 45 of the *Employment Act*.

Reliefs

26. In view of the matters above, I make declarations that the termination of the petitioner’s employment was unfair, unlawful and violated the petitioner’s rights to equality and freedom from discrimination, fair labour practices and fair administrative action as enshrined under article 27, 41 and 47 of the *Constitution* and regulated by section 5, 41 and 45 of the *Employment Act*.

27. As already observed above, the aforesaid rights under article 27, 41 and 47 of the *Constitution* are regulated by Section 5, 41, 45 and 46 of the *Employment Act* and remedied under section 49 of the Act. Consequently, I find that the invocation of this court’s jurisdiction under article 21 and 165 of the *Constitution* was uncalled for. However, since the claims are well particularized in line with the *Employment Act*, substantive justice will be served if I assess damages under section 49(1) read with section 50 of the Act.

28. It is common ground that notice was served before the termination, and therefore I will only award damages for the unfair termination. The petitioner served for only 2 years, but since the reason for the termination was discriminatory on account of pregnancy, I award her six (6) months gross salary for unfair termination equaling to Kshs 66,000.00.

29. The claim for house allowance is declined because clause 4 of her written contract which never changed till termination, provided for gross salary of Kshs 11,000.00.

30. The claim for leave lacks particulars and evidence and is therefore declined.

31. However, the claim for service pay is granted at the conventional rate of 15 days’ pay per year of service. The petitioner served for 2019 to 2022 which was slightly above 2 years. Consequently, she gets Kshs 11,000.00 as service pay.

32. In conclusion and for the reasons set out herein above, I enter judgment for the petitioner declaring that termination of her employment was unfair and it violated her constitutional rights under article 27, 41 and 47 of the *Constitution*. I further award her the following:-

Compensation.....Kshs 66,000.00

Service pay..... Kshs 11,000.00

Kshs 77,000.00



The award is subject to statutory deductions but in addition to interest at court rates from the date of this judgment. She will also have costs based on the lower courts rate because that is where a normal suit should have been filed.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF MAY, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE

