



**Ogayo v China Wu Yi Company Limited (Petition E168 of 2022)
[2023] KEELRC 1498 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1498 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E168 OF 2022
AN MWAURE, J
JUNE 13, 2023**

BETWEEN

LILIAN AKINYI OGAYO PETITIONER

AND

CHINA WU YI COMPANY LIMITED RESPONDENT

JUDGMENT

Claimant's Case

1. The Petitioner is an adult person of sound mind, and former employee of the Respondent.
2. The Respondent is a limited liability Company incorporated in the Republic of Kenya under Chapter 486 Laws of Kenya with its registered office at Nairobi.
3. The Petitioner says she was orally employed by the Respondent in April 2009 as a kitchen assistant with a monthly salary of Ksh 8,000 and was later given a salary increment to ksh 18,000 per month at the time of termination. She has never been faulted verbally or in writing for the last 14 years in employment as she claims. The Petitioner says she moved to the Respondent's living quarter at Nyangumi Road Kilimani in Nairobi where she had lived until February 1, 2022 when she took her maternity leave. She says the maternity leave was only given when the Respondent realized that the claimant was sick and could deliver anytime. The Respondent's conduct of not allowing the Petitioner to take her maternity leave at least a month before delivery demonstrates how ruthless the Respondent is.
4. She says that on the May 2, 2022 the Petitioner reported to work and went to the office to see her boss who reiterated that her house is still there but can only move without her baby. She said that on the June 15, 2022 while on duty at 7.00 am the supervisor Mr Xui informed the Petitioner that she had been transferred to Athi River site immediately. The Petitioner says that upon enquiring where she would stay with her baby in Athi River one Mr Xui told him to choose if she is for work or baby. The Petitioner could not go to Athi River under the circumstances and therefore continued to work until



- 22nd June when her boss called her to 1st floor in the conference room and informed her to continue working for the next 2 days.
5. She says her boss one Mr Lin further informed her that because her supervisor had left for Athi River site, her services would no longer be required and proposed that he will pay her salary, one month notice and leave. The Petitioner says that on the 24th June she was to leave but her workmate in the kitchen tested positive with Covid 19 virus and requested Mr. Lin that the Petitioner continued working until she recovered. On the June 28, 2022 she was served with a termination letter under redundancy.
 6. The Petitioner says that she was discriminated on the ground of her pregnancy by the Respondent.
 7. The claimant prays for the following remedies;
 - a. A declaration that the Petitioner's termination of employment on account of pregnancy is discriminatory, unfair and unlawful and is in violation of Article 27 (5), and section 5 (3) of the Employment Act.
 - b. A declaration that the Respondents purported termination of the petitioner's employment on grounds of redundancy was a breach of the petitioner's right to a fair labour-practices contrary to Article 41 of the Constitution and section 40 of the Employment Act and therefore unfair and unlawful.
 - c. A declaration that the petitioner is entitled to compensation for violation of her rights as per (a) and (b) above
 - d. An order directing the Respondent to pay the Petitioner her terminal benefits as set out in paragraph 30 of the Petition.
 - e. Interests on (c) and (d) above from the date of filing of the suit until payment in full.
 - f. Costs of the suit
 - g. Such further or other relief as this honourable court may deem fit.

Respondent's Case

8. The Respondent in the replying affidavit deposed to by Luo Zicheng averred that contrary to the petitioner's assertions of discrimination in the petition, the Respondent was in fact very accommodative of the Petitioner when it learnt that she was expectant and permitted her to work for few hours and only gave her only light duties. That once the Petitioner was due for delivery, she applied for and took her maternity leave as per the law and company policy from January 30, 2022 until May 2, 2022 when she resumed work.
9. That during this period she was paid full salary. The Company also keenly followed up on her welfare through her colleagues if she was well and was at all times ready to offer any support as necessary. It is deposed that when the Petitioner resumed work, she physically appeared to be in good health and appeared ready to work and at no point did she bring to the attention of the company that she was facing any difficulties that needed special consideration. The witness said that claimant brought along her new born baby to work, which meant that she would not be able to discharge her routine duties and care for the baby at the same time as the company is not well equipped with child nurseries and neither does it, as part of the employees' benefits, retain caregivers.
10. It is deposed that the petitioner was advised that she could not possibly come to work with the baby, since the work environment does not allow the presence of such young child. The company also feared



that the baby would not only be a distraction to the petitioner, but it was also going to present logistical challenge, since the place of work did not have the facilities for taking care of the baby. That it is for this reason that the claimant was asked to find alternative accommodation for the child as opposed to bringing the child to the office.

11. The accommodation offered to the Petitioner prior to the delivery is within the building that hosts the Respondent's offices, the same is therefore considered an office block with customized residential floors unsuitable for persons with families. All employees housed within the premises do not have their families with them since accommodation is only for the employees themselves and this equally applies to employees of Chinese origin. Further, the accommodation is shared with multiple employees occupying a single room and therefore this can certainly inconvenience not only the mother but also the employees.
12. When the Petitioner's immediate supervisor was transferred to another company station in Athi River, the Petitioner was lawfully transferred to Athi River where she would receive ample accommodation as well as be able to continue working from there. That despite these lawful instructions from the supervisor, the Petitioner failed/refused/disobeyed the same and refused to proceed on transfer. Athi River is on the outskirts of Nairobi and not far off from the city so as to inconvenience the Petitioner. The transfer was an informed decision not intended at disadvantaging the petitioner. The company has branches across the country.
13. The respondent says he was surprised when they received a letter from the County Labour Office, in which the petitioner appeared to have made a complaint that they had terminated her employment un-procedurally. The claimant alleged that she was terminated on account of redundancy when that was not the case. The letter appears to be forged document as all their documents are always signed. The company never issued the claimant with a termination notice.
14. The Respondent sent a representative to attend a meeting with the Labour Officer and explained in detail to the Labour officer that the conditions for work were not going to be favourable to the petitioner at the Nairobi office, and the best solution was for the Petitioner to work at Athi River office since it would accommodate her better given the situation with her baby. The respondent said that it seemed the claimant had decided to abscond work, having not showed up from around August. The Petitioner then served them with a demand letter and they had a protracted negotiations with the Petitioner with respect to her resuming work but she maintained her ground as she appeared to be hell bent on filing suit rather than resuming her job. They sent letters to the Petitioner on the September 15, 2022 and September 21, 2022 asking her to resume work they try to sort out any issues especially with the safety and accommodation of the baby. The claimant then later served them with court papers.

Petitioners Further evidence

15. The Petitioner in the further affidavit says that when she resumed work after giving birth, she came with her maid to take care of her child and at no time could her child have been an impediment to the discharge of her duties and that it is very unfair to be singled out for termination just because one is lactating.
16. The Petitioner says that she never used to share the room with anyone and one of her colleagues had given birth and was allowed to stay in the living quarters but was ordered to look for alternative accommodation one week before claimant resumed work to show that there was no favouritism.
17. The Petitioner says she got alternative accommodation but whilst settling was informed that she had been transferred to Athi River and had to leave that very morning. The Petitioner says she enquired



- whether babies are allowed but was informed that she had to find alternative accommodation in Athi River to which she protested that the notice was too short.
18. The petitioner continued working until June 22, 2022 when Mr LIN called her in the conference room and informed her that her services were no longer required and requested that she work for only another 2 days. She deposes that in the afternoon she was issued with a one-month termination notice dated the June 27, 2022 which indicated that she was being terminated because of overstaffing and reduction of work. The letter was presented to her to acknowledge receipt which she declined because it had not been signed and only took a photo of it.
 19. The petitioner deposed that the letters referred to by the Respondent in paragraph 31 of its replying affidavit were of no consequence as already she was terminated. The Respondent was trying to salvage its image that was already tainted with labour malpractices and violation of her right to have and keep her family in dignity.
 20. The Petitioner submits that the Respondent terminated her services because of her baby. The respondent relied on the unfounded fears that the Petitioner would be distracted by the infant and hence not deliver her services as expected. From the foregoing it's presumptive that the Respondent has no respect for the expectant employees and their families yet the family unit is protected by Article 45 (1) of the Constitution. The petitioner further relied on the case of Tracy Wangechi Mugambi v Windsor Golf Hotel and Country Club 2019 e KLR where it was held that 'there is no indication that the Petitioner committed any other offence from July 2014 to January 2015 when she delivered her baby. The issue of absconding duty is also not raised in the termination letter. This leaves only one plausible reason for the termination being pregnant and delivering a baby. In the current petition I have not found any plausible reason for terminating the petitioner after reporting from maternity leave other than the inconvenience, the Respondent may have anticipated from the petitioner following delivery of a baby. This indeed is against Article 27 of the Constitution, which forbids discrimination.
 21. The Petitioner further relied on the case of Yasmine Josephine Mokaya v Kitbure Kindiki T/A Kitbure Kindiki & Associates (2021) where the court held that 'this horizontal discrimination was recognized by this court in the Industrial Court at Nairobi, Cause No 1161 of 2020 VMK v CUEA in which the court awarded the claimant ksh 5,000,000 as general damages for discrimination at the work place on account of HIV and AIDS and pregnancy. The court in that case considered the case of Daniel Musinga t/a Musinga and Co Advocates v Nation Newspapers Limited (2000) eKLR on general damages as it stated:

“The court has to look at the whole conduct of the parties before action, after the action and in compensatory damages such sum, as will compensate him for the wrong he has suffered. An award of damages must cover injured feelings, the anxiety and uncertainty undergone during the court trial.
 22. The Petitioner therefore contends that she is entitled to an award of general damages for discrimination on account of pregnancy after satisfying all conditions precedent in dissemination.
 23. The Petitioner therefore contends that the Respondent in its notice of termination dated the June 27, 2022 indicated that the termination was on account of redundancy but sighted the Petitioner's rejection to go to Athi River site as the reason for the termination. The Respondent did not attempt to comply with the provisions on redundancy hence termination of the petitioner was unfair and unlawful hence compensation for the Petitioner as particularized are due and payable to her.
 24. There are no submissions for the Respondent.



Determination

25. The Petitioner is asking the court to make declaration that her termination of employment was because of her pregnancy, and therefore discriminatory, unfair, unlawful and in violation of section 5 (3) and 46 (a) of the [Employment Act](#), ILO Maternity Protection Convention and under Article 27 (4) of the Constitution.
26. Section 5 (3) of the [Employment Act, 2007](#) prohibits any employer from discriminating either directly or indirectly against an employee or prospective employee or harassing an employee on grounds of a pregnancy.
27. In Petition Number 62 of 2019, [Yasmin Mokaya and Kithure Kindiki T/A Kithure Kindiki & Associates](#), the Court observed that:
- ‘Article 27 elevated the matter of discrimination on grounds of pregnancy to the Bill of Rights in the Constitution of Kenya, 2010. This has seen litigants approach court on the issues of discrimination at the workplace by way of a statement of claim under the [Employment Act](#), 2007 or by a constitutional petition under Article 23 of the Constitution. Whichever way a litigant follows, the primary onus of proof on the alleged facts lie with the claimant or the Petitioner in terms of sections 107 and 108 of the [Evidence Act](#) Cap 80 Laws of Kenya.
28. By dint of section 5(6) of the [Employment Act](#), the employer bears the burden of proving the fact that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in the section.
29. In [GMV v Bank of Africa](#), Industrial Cause Number 1227 of 2011 the court held that:
- “The court must make it clear that there is absolutely no requirement for ladies who claim to have been discriminated against by their employers on ground of pregnancy, to strictly prove that they were indeed discriminated against on such ground. The starting point is section 5 (6) of the [Employment Act](#) 2007...This places the burden of proof on the employer not the employee. This position has adequate support in section 43 of the Act, which requires the employer to prove the reason for termination.....All the employee needs to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies.
30. In [GVM v Bank of Africa Ltd](#) cited supra the court referred to the United States Court decision Reeves v Sanderson Plumbing Products Inc 530 US. 138, 141 where the court developed evidentiary threshold as follows;
- ‘In appropriate circumstances, the trier of facts can reasonably infer from falsity of the explanation that the employer is dissembling, to cover up discriminatory purpose. Such inference is consistent with the general principle of evidence law, that the trier of fact is entitled to consider a party’s dishonesty about a material fact, as affirmative evidence of guilt. Moreover, once an employer’s justification has been eliminated, discrimination may well be the most alternative explanation, especially because the employer is in the best position, to put forth the actual reason for its decision...thus, the claimant’s prima facie case combined with sufficient evidence to find that the employer’s asserted justification is false,



may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee.

31. It follows that the Petitioner in the present petition must satisfy the court that there is prima facie evidence that she suffered adverse action as a result of her pregnancy. This in my view is to be analysed in light of the evidence that the Respondent offers to controvert the allegations of discrimination.
32. It is common cause that the Petitioner worked with the Respondent Company as a kitchen assistant. The Petitioner says that on the February 2022 she took maternity leave. She says the leave was given last minute and the Respondent was at first unwilling to let her go on leave. She also says that she was called and informed not to come with the child at workplace. This has been disputed by the Respondent who says the Petitioner was given all the support she needed during the pregnancy.
33. There is no material corroborating either of the assertions.
34. That said, the main issue that led to the current claim flows from the decision of the Respondent in asking the Petitioner not to be at the work place with her new born child as it says the work environment did not allow for the presence of such a young child and it does not as part of the employees' benefits to retain caregivers.
35. The Petitioner in the deposition says that after being told not to come with the child at the workplace she got a servant's quarter outside the office place for a monthly rented house. That on the June 15, 2022 at 7.00 a.m she was informed that she had been transferred to Athi River site without notice. She says she told the supervisor that she could not just leave because she was not going to stay in the company quarters and needed time to organize herself. She said she continued working until 22nd of June 2022 when she was called by the supervisor and asked to work for 2 days so that her salary for July could be paid to which she obliged. She added in the further affidavit that the supervisor had informed her her services were no longer required.
36. The foreshadowed in my view does not make for a case of discrimination based on pregnancy. The Respondent and the Petitioner had merely differences as to the issue of bringing along the Petitioner's new born child to what was considered the workplace. The court avers this because the employer in my view has the latitude to decide who apart from employee is to have permanent abode of what is considered its offices or any of its premises based on the nature of work normally undertaken within the vicinity.
37. The employer also can make reasonable decisions to transfer employees. What was expected of the Petitioner was to simply ask in formalised fashion for time to move to the new workplace, which unfortunately the Petitioner never did. Instead, she stayed put for 7 days when she says she was informed that her services were no longer required. Also, it is not apparent from the evidence produced that the conditions at the new workplace would not be conducive for the baby. And this was only one instance of decision to transfer and could not be viewed as discriminatory notwithstanding the fact that the petitioner had a young child.
38. But even supposing that a decision to terminate was at some point made by the Respondent, they did make attempts to have the petitioner back to employment who it appears had made the decision to have the matter brought to court. Reinstatement of an employee to previous position is one of the remedies normally given by court, and in the instant case it showed that the Respondent was not after all seeking to make sure that the Petitioner stops her engagement with the Company, despite her giving birth.
39. The petitioner has not given any evidence to demonstrate how she was discriminated on the basis of having delivered a baby. There is no evidence that the respondent alluded to termination of the



petitioner because of having had a new baby. The fact that the respondent did not have appropriate facilities to accommodate a baby cannot be interpreted to be discrimination. The court finds the petitioner has not proved a case for discrimination as provided in section 107 and section 108 of the *Evidence Act*.

40. The petitioner alleges she was served a termination letter dated June 27, 2022 but the same was not signed. She claimed the said letter provided termination was because of redundancy. The respondent claimed they never issued such a letter and it was an unsigned letter. The court finds that letter is not authentic and cannot be genuinely proved to have been issued by the respondent.

41. Thereafter on September 15, 2022 and on September 21, 2022 the respondent wrote to the petitioner to resume work. It is not clear what happened to the petitioner after she received those letters urging her to resume work. The said letters seems to have renegated their letter of July 25, 2022 which in any case was not addressed to her but to the county labour officer. The letter of July 25, 2022 had stated that the company had decided to terminate her for failing to report to Athi River and would pay her the following :

1. one month salary in lieu of notice 18,000/-
2. Accrued leave 18,000/-
3. Less the 10,000/-
4. Balance 26,000/-

42. Having found that the petitioner did not prove a case of discrimination and no proof of termination via redundancy the court can only find that the petitioner left employment on her own decision and was not unlawfully or wrongfully terminated.

43. The petition dated September 12, 2022 is therefore dismissed and the court will order each party to meet their costs.

44. The respondent had offered to pay the petitioner by their letter of June 25, 2022

- i. one month salary in lieu of notice 18,000/-
- ii. Leave days 18,000/-
Total 36,000/-

And 10,000/- is not deducted as is not proved. The same to be paid to the petitioner accordingly plus interest from the date it was due till payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF JUNE, 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

