



**Muthaka v Nairobi Java House Limited (Petition E153 of 2021)  
[2023] KEELRC 1536 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1536 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E153 OF 2021  
NJ ABUODHA, J  
JUNE 9, 2023**

**BETWEEN**

**MELVIS MUTHONI MUTHAKA ..... PETITIONER**

**AND**

**NAIROBI JAVA HOUSE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a petition dated 23<sup>rd</sup> September, 202, the petitioner alleged that;
  - a. That vide the contract dated 13th October, 2018 (hereinafter “Employment Contract”). The respondent retained the Petitioner in its employment with effect from 22<sup>nd</sup> October, 2018.
  - b. That as per the Employment Contract, paragraph 4 thereof the Petitioner was to serve a probation period of three (3) months with effect from 22<sup>nd</sup> October, 2018 which the petitioner duly served and completed.
  - c. That further, as per the Employment Contract, paragraph 10 thereof, the petitioner was entitled to three (3) months maternity leave with full pay, in addition to her annual leave.
  - d. That further, arising from the Employment Contract, the Petitioner benefited from the medical scheme as provided by the Respondent where she was issued with a medical access smart card, membership number JAVA5139/00, which membership card she was to use on any medication during employment, to be returned upon separation with the respondent.
  - e. That further, as per paragraph 6 of the Employment Contract, the petitioner was entitled to a gross monthly salary of Kshs 18,700/= which she duly earned.
  - f. That in the year 2019 around January, the Petitioner became expectant.
  - g. That during the pregnancy, the following transpired.



- i. That, in the month of February, 2019 the Petitioner experienced abdominal pains, leading to Doctors recommending severally, her rest from work. The petitioner communicated the Doctor's recommendation to her supervisor at Java TRM verbally, who also verbally accepted her taking rest as per the Doctor's recommendation.
- ii. That, in the month of March, 2019, the Petitioner was diagnosed with threatened miscarriage, where her Doctor recommended further rest from work due to the high risk nature of her pregnancy. This, the petitioner also communicated to the respondent, of which the Respondent through the Petitioner's supervisor at Java TRM acknowledged and granted her leave.
- iii. That due to the persistent pain and inability to work, the Petitioner's supervisor at Java TRM recommended that the Petitioner visits the Respondent's head office for further guidance on her condition.
- iv. That the petitioner, despite undergoing an operation in the nature McDonald's Stitch proceeded to the Respondent's offices where she met the Human Resource Manager who advised her verbally to proceed and rest until she delivers.
- v. That the Petitioner had a successful delivery in the month of August, wherein her maternity leave commenced and ran between the period of August and October 2019, to end in the beginning of November, as per the provisions of the Employment Contract.
- vi. At all these time, the Petitioner's phone contact, email address, and post office number were operational of which her supervisor at Java TRM would constantly check on her to find out the status of her progress.
- vii. That during this period, the petitioner used the medical card provided, of which both the Petitioner and Respondent were notified of the costs incurred.
- h. That upon completing her maternity leave, the Petitioner duly returned to her work station at Java TRM where her supervisor informed her to proceed to the head office for reassignment of duties.
- i. That the Petitioner duly proceeded to the Respondent's office at ABC Place wherein she met the Human Resource Manager who verbally advised her to proceed home and await communication on reassignment of duty.
- j. That in the year 2020, around March, the Respondent advertised for further positions, which the Petitioner duly applied for as the Respondent had not communicated on the reassignment of her duties.
- k. That the Petitioner was duly shortlisted and proceeded to attend the interview where she highlighted to the Respondent that she was still an employee despite having applied for the same position.
- l. That, at the said interview, the Petitioner was not informed of any dismissal from her position or any disciplinary action that had been taken against her. Indeed, she successfully passed the interview but, however, declined the position as it would involve her standing for long hours despite having just emerged from a difficult pregnancy.



- m. That during the year 2020, the COVID-19 pandemic struck the entire nation, wherein most hotels were closed and communications cut. Nothing substantial took place during the intervening period.
  - n. That in the year 2021, when the restrictions imposed as a result of the pandemic were lifted, the Respondent advertised for several positions, of which the Petitioner duly applied for and was successfully shortlisted, attended the interview, and passed. In the said interview, she informed the Respondent that she had never been dismissed and that she was indeed even using the medical card provided by the Respondent. It is then that the Respondent indicated verbally that there was a mistake done and they could not allow her to work.
  - o. That upon further inquiry, the Petitioner was informed that despite passing the interview and being successful, the use of the medical card would have to be investigated as it was a disciplinary issue.
  - p. That following this allegation of a disciplinary issue, the Respondent told the Petitioner to go home without any notice, basis, or reason, or confirmation of her employment status.
  - q. That as a consequence, the Petitioner duly served the Respondent with a demand letter dated 24<sup>th</sup> August, 2021 requiring the Respondent to address the constructive dismissal of the Petitioner.
  - r. That in response to the demand letter, the Respondent highlighted, among others,
    - i. That the Petitioner had allegedly absconded duty on the 30<sup>th</sup> of January, 2019;
    - ii. That not being aware of the Petitioner's whereabouts, the respondent had allegedly made numerous attempts to reach her on telephone;
    - iii. That, allegedly, not having reached the Petitioner, the Respondent allegedly proceeded to issue her with a show cause letter for an alleged hearing on the 8<sup>th</sup> of February, 2019;
    - iv. That, allegedly, the Petitioner did not attend the disciplinary hearing and, consequently, was summarily dismissed.
  - s. That the Petitioner is aware that she has never been served with or notified of the show cause letter or notice to attend disciplinary hearing, or the summary dismissal letter. The Petitioner's phone, email, and postal address were available and operational throughout this period.
  - t. That during the period between the Petitioner Maternity and the date of the Respondent's response to demand, the Petitioner's insurance card as issued by the Respondent has always been functional, of which the Petitioner continued to use.
  - u. That as a consequence of the said allegations by the Respondent, the Petitioner has been constructively and summarily dismissed in breach of her constitutional and employee rights.
2. The petition was further supported by the affidavit of the petitioner in which she repeated the same facts in the petition.
  3. The Respondent filed a replying affidavit through one Jude Chege in which she stated among others that;
    - i. The Respondent is a limited liability company incorporated in Kenya. It is composed of coffee shops across Kenya offering high-quality, affordable African-grown coffee and a full menu of international cuisine.



- ii. The Respondent is an equal opportunity employer and is committed to equal employment opportunity regardless of pregnancy status, race, color, ancestry, religion, sex, national origin, sexual orientation, age, citizenship, marital status, disability and gender identity.
- iii. I note from the Petition and the Supporting Affidavit that the Petitioner makes several claims against the Respondent, the most prominent of which is that she was "constructively and summarily dismissed" in an unfair, unlawful and discriminatory manner and in breach of her constitutional and employee rights.
- iv. As the Human Resources Manager of the Respondent, I am the custodian of the Respondent's human resources records. I have reviewed the foregoing records as they relate to the Petitioner herein and noted several relevant factual matters, which I have highlighted below.
- v. The Respondent employed the Petitioner as a Wait Staff with effect from 22<sup>nd</sup> October 2018 vide a contract of employment dated 13<sup>th</sup> October 2018 ("the Employment Contract") and an accompanying job description dated 17<sup>th</sup> October 2018 ("the Job Description").
- vi. It is important for me to point out that the Petitioner's employment was governed by the Respondent's Employee Handbook and was subject to Kenyan law in general and the *Employment Act*, 2007 in particular.
- vii. In response to the contents of paragraph 2 of Section C of the Petition and paragraph 3 of the Supporting Affidavit, I wish to state as follows:
  - a. Under the Employment Contract, the Petitioner was to serve a probation period of 3 months from 22<sup>nd</sup> October 2018;
  - b. The Petitioner's probation was set to end on 21<sup>st</sup> January 2018, when she would have sat her final probation assessment;
  - c. The Petitioner did not sit her final probation assessment as she away from work on sick leave between 9<sup>th</sup> January 2019 and 28<sup>th</sup> January 2019.
- viii. In response to the contents of paragraph 6 of Section C of the Petition and paragraph 7 of the Supporting Affidavit, I wish to state that the Respondent has absolutely no record of the Petitioner reporting or making known to the Respondent a pregnancy and/or her suffering difficulties or complications relating to a pregnancy while she was an employee of the Respondent.
- ix. Further to the above, it is noteworthy that the Claimant's allegation that she got pregnant and then took maternity leave sometime in 2019 was first made through a demand letter dated 24<sup>th</sup> August 2021 ("the Demand Letter"). The Demand Letter was issued on the Petitioner's behalf by the Petitioner's Advocates on record.
- x. The Petitioner was away from work between 9<sup>th</sup> January 2019 and 28<sup>th</sup> January 2019, due to an alleged illness whose nature she did not disclose. The foregoing absence from work was permitted by the Respondent as the Petitioner had produced a medical certificate/certificate of incapacity to work.
- xi. The Petitioner did not report to work following her sick leave. At the request of her supervisor, the Petitioner undertook to report to the Respondent's then Human Resources Manager on 29<sup>th</sup> January 2019 to explain her situation.



- xii. The Petitioner did not report to the Respondent's then Human Resources Manager on 29<sup>th</sup> January 2019. Further, she did not produce a medical certificate/ certificate of incapacity to work or other document to demonstrate the reasons for her absence from work.
- xiii. Between 30<sup>th</sup> January 2019 and 4<sup>th</sup> February 2019, the Petitioner did not attend work. During this period, all attempts by the Respondent's employees to reach the Petitioner on her phone were fruitless as the Petitioner was not picking calls.
- xiv. I refer to page 25 of the Employee Handbook (i.e. page 34 of Exhibit JC1), under which failure to show up for a shift without notifying the manager on duty (i.e. no call, no show, no job) amounts to absconding of duty. This entitles the Respondent to take necessary disciplinary action against the employee in question.
- xv. Due to the Petitioner's failure to attend work from 30<sup>th</sup> January 2019 to 4<sup>th</sup> February 2019, the Respondent sent a letter dated 4<sup>th</sup> February 2019 ("the Show Cause Letter") to her requesting her to show cause why disciplinary action should not be taken against her. The Respondent also invited the Petitioner to attend a disciplinary hearing scheduled for 7<sup>th</sup> February 2019 at 10:00am at which the Petitioner would have an opportunity to make representations on the allegations against her.
- xvi. The Petitioner did not respond to the Show Cause Letter.
- xvii. The Petitioner did not attend the disciplinary hearing scheduled for 7<sup>th</sup> February 2019 at 10:00am.
- xviii. Considering the Petitioner's failure to show cause why disciplinary action should not be taken against her for absconding duty and her failure to attend and make representations at the disciplinary hearing, the Respondent terminated her employment with immediate effect. The termination was communicated through a letter dated 8<sup>th</sup> February 2019 ("the Termination Letter").
- xix. The Respondent issued the Petitioner with a Certificate of Service as required by law.
- xx. Considering the foregoing paragraphs, I verily believe that the Petitioner's employment was terminated in a fair and lawful way.
- xxi. In response to the contents of paragraph 7 of Section C of the Petition and paragraph 8 of the Supporting Affidavit, I wish to state as follows:
  - a. In relation to sick leave:
    - i. Sick leave was amongst the Petitioner's entitlements. It was provided for under clause 8 of the Employment Contract (as read with section 30 of the [Employment Act, 2007](#));
    - ii. The Petitioner's entitlement to sick leave was subject to the Petitioner:informing the Respondent as soon as reasonably practicable of her absence and the reasons for it;producing a medical certificate/ certificate of incapacity to work signed by a duly qualified medical practitioner;
    - iii. The Petitioner did not produce (and has never produced) a medical certificate/ certificate of incapacity to work to the Respondent in relation to the period between 30th January and 4th February 2019;



- iv. The Petitioner's allegation that her supervisor at Java TRM verbally accepted her request to take time off work and/ or leave to rest in February and March 2019 (based on recommendations from the Petitioner's doctor) is incredible considering that: The Petitioner's supervisor at Java TRM specifically instructed the Petitioner to report to the Respondent's then Human Resources Manager on 29<sup>th</sup> January 2019. The Petitioner did not comply with this instruction; The Petitioner was required to produce a medical certificate/ certificate of incapacity to work relating to her absence from work but she did not produce this; The Petitioner did not produce a medical certificate/ certificate of incapacity to work relating to any period in February 2019 while she was in employment with the Respondent.
  - v. The insinuation that the Petitioner was on some form of sick leave between 8<sup>th</sup> February 2019 and August 2019 is entirely baseless. This is because the Petitioner was not an employee of the Respondent during that period.
- b. In relation to maternity leave:
- i. Maternity leave was amongst the Petitioner's entitlements. It was provided for under clause 10 of the Employment Contract (as read with section 29 of the [Employment Act, 2007](#));
  - ii. The Petitioner's entitlement to maternity leave was subject to her giving the Respondent at least 7 days' written notice in advance of her intention to proceed on maternity leave on a specific date and to return to work thereafter;
  - iii. During her employment with the Respondent, the Petitioner did not give the Respondent any notice (whether written or unwritten) of her intention to proceed on maternity leave and to return to work thereafter;
  - iv. The Petitioner's allegation that she was on maternity leave between August 2019 and October 2019 is entirely baseless. This is because the Petitioner was not an employee of the Respondent during that period.
- c. In relation to annual leave:
- i. Annual leave was amongst the Petitioner's entitlements. It was provided for under clause 7 of the Employment Contract (as read with section 28 of the [Employment Act, 2007](#));
  - ii. The Petitioner's entitlement to annual leave was subject to: The Petitioner logging in a request for leave at least 2. weeks prior to commencement of the annual leave through the Employee Self Services (ESS). However, in the event that the human resource information system had challenges, the Petitioner was required to apply for leave through the leave books at least 1 work week before commencement of the leave; The leave requested for being fully approved by all the approvers. During the period between 30<sup>th</sup> January 2019 and 4<sup>th</sup> February 2019, the Petitioner was not on annual leave.
- d. In relation to medical insurance:
- i. During her employment with the Respondent, the Petitioner was entitled to medical cover under the Respondent's medical insurance scheme;



- ii. The Respondent caused the Petitioner to be issued with a medical access smart card number JAVA5139/00 (the Medical Card), which she was entitled to use when seeking treatment;
  - iii. Under the terms of her employment, the Petitioner was required to return the Medical Card upon termination of her employment;
  - iv. Following the termination of the Petitioner's employment, the Respondent expected the Petitioner to return the Medical Card. However, the Petitioner did not do this;
  - v. In June 2019, the Respondent eventually instructed its insurance brokers (Zamara Risk & Insurance Brokers Limited) to have the Petitioner removed from the Respondent's medical insurance scheme. This was implemented with effect from February 2019. The above is borne out by the contents of email correspondences exchanged between the Respondent and its insurance brokers on 4<sup>th</sup> June 2019, true copies of which are contained in page 76 to 79 of the bundle of documents annexed to this Affidavit as Exhibit JC 1.
  - vi. Considering the above: any use of the Medical Card by the Petitioner between 8<sup>th</sup> February 2019 and 4<sup>th</sup> June 2019 was fraudulent; the Petitioner could not possibly have used the Medical Card after 4<sup>th</sup> June 2019.
- e. It is notable that the Petitioner does not adduce any documents demonstrating her alleged phone, email and postal communications with her supervisor at Java TRM, whether during the period between 30<sup>th</sup> January 2019 and 7<sup>th</sup> February 2019 or thereafter.
- xxii. The contents of paragraphs 10, 11 and 12 of Section C of the Petition and paragraphs 11, 12 and 13 of the Supporting Affidavit are entirely false and are denied. In response thereto, I wish to state that:
- a. The Respondent did not conduct any interviews in March 2020;
  - b. The Respondent did not invite the Petitioner to any interview nor interview her for any position in the year 2020
- xxiii. It is also notable from the contents of paragraphs 10, 11 and 12 of Section C of the Petition and paragraphs 11, 12 and 13 of the Supporting Affidavit that:
- a. The Petitioner does not mention the specific dates and times when the alleged happenings took place;
  - b. The Petitioner does not adduce any documents demonstrating that the alleged happenings took place.
- xxiv. In response to the contents of paragraphs 14, 15 and 16 of Section C of the Petition and paragraphs 15, 16 and 17 of the Supporting Affidavit, I wish to state as follows:
- a. It is true that in the year 2021 the Petitioner applied for employment with the Respondent as a Steward;



- b. It is also true that the Respondent shortlisted the Petitioner for the Steward position and invited her for an interview which she attended. The said interview took place on 9<sup>th</sup> August 2021;
  - c. I am informed by Mr. Evans Mutuma, who was one of the members of the panel that interviewed the Petitioner on 9<sup>th</sup> August 2021, and I verily believe that:
    - i. During the interview: The Petitioner stated that she was holding the Medical Card. In response to the Petitioner's statement, the interview panel informed the Petitioner that the matter would be investigated; The interview panel did not make any statement to the effect that the holding of the Medical Card by the Petitioner was a disciplinary issue; The interview panel did not make any statement to the effect that a mistake had been made and the Petitioner could not be allowed to work; No discussion was held regarding the Petitioner's employment status and/or dismissal
    - ii. The Petitioner did not pass the interview.
  - d. From the above, it is clear that the following allegations by the Petitioner are entirely false:
    - i. The allegation that she passed the interview that she attended in the year 2021;
    - ii. The allegation that the Petitioner contended that she had not been dismissed;
    - iii. The allegation that the Respondent stated verbally that a mistake had been made and she could not be allowed to work.
  - e. Whilst the Petitioner did not return the Medical Card after her termination, she could not possibly have used it after 4<sup>th</sup> June 2019.
4. In the submissions in support of the petition, Mr. Ochieng for the petitioner submitted inter-alia that the respondent unlawfully terminated her employment and that the termination was not for a valid reason and the employee did not follow any of the procedural requirements in the Act.
  5. According to Counsel, the respondent purported to have terminated the petitioner for her failure to show cause why disciplinary action should not be taken against her for absconding duty and her failure to attend the disciplinary hearing and make representations. These according to Counsel are convenient excuse for the respondent's attempt to cover up the discriminating motive underlying the petitioner's termination.
  6. The Petitioner maintained that the actual reason for the Adverse decision against her was occasioned by the Respondent's realization that she was experiencing a difficult pregnancy characterised by persistent pain and that it would have likely tampered her discharge of duty as a wait staff since she could not be on her feet for long periods and that her situation could possibly lead to prolonged absence from work.
  7. According to Counsel, the Petitioner was away from work between 9<sup>th</sup> January, 2019 and 28<sup>th</sup> January, 2019 on account of illness. Accordingly, it became indisputable and readily apparent to the respondent that the Petitioner was having health challenges associated with her pregnancy.
  8. Upon lapse of her sick leave, the petitioner returned to work on 29<sup>th</sup> January, 2019 and explained to her supervisor about the high risk nature of her pregnancy. The supervisor allowed her to go home and



- rest but advised her to report to the head office for further guidance which she did and the Human Resource Manager also advised her to go home and rest until delivery.
9. Counsel urged the court to note that both the supervisor and the Human Resource Manager issued the respective directives to the petitioner verbally and neither of them made any official record indicating that they allowed the petitioner leave on account of her medical condition. Counsel questioning the respondent commenced disciplinary proceedings notwithstanding that both the supervisor and the Human Resource Manager were aware of her situation and allowed her to take leave from work. According to Counsel failure by the respondent to make any official record of the petitioner's absence from work was to set foundation for her dismissal for reasons disclosed in the letter dated 4<sup>th</sup> February, 2019. To this extend Counsel relied on the case of *Tracy Wangeci Mugambi v Windsor Golf Hotel & Country club* [2019] eKLR and *GMV v Bank of Africa Kenya Limited* [2013] eKLR.
  10. Mr. Ochieng further submitted that the respondent did not adhere to any of the procedural dictates that underline a fair and lawful termination from employment. The respondent never gave the petitioner any notice whether contemplated under Section 35(1)(c) or 44 of the *Employment Act*. Counsel wondered how it was possible that they could not reach the petitioner during the time she was absent from work at the same time asserted that they sent the petitioner the notice to show cause and invitation to attend the disciplinary proceeding through a letter dated 4<sup>th</sup> February, 2019. It begged the question how the respondent managed to send the letter to the petitioner yet it alleged it had no knowledge of petitioner's whereabouts and had been unable to reach her prior to the sending of the said letter. Further, the respondent had the petitioner's phone number, email address and postal address which remained active and operational throughout the period in contention. The Respondent never tendered any evidence of the alleged attempts to reach the petitioner either through phone call logs, email printouts or postal dispatch. Additionally, there was no endorsement of receipt by the petitioner of the letter dated 4<sup>th</sup> February, 2019 or any other correspondence such as the termination letter dated 8<sup>th</sup> February, 2019.
  11. On the issue of equality and discrimination, Counsel relied on the cases of *Tracy Wangeci Mugambi v Windsor Golf & Country Club* and *GMV v Bank of Africa, (Kenya) Limited* and *Claudine Wanjiku v Exon Investments Limited & another*.
  12. Regarding the remedies sought Counsel submitted that the Petitioner had demonstrated numerous violations by the respondent that effectively rendered the termination of her employment unfair and unlawful. She therefore deserved twelve months salary as compensation for unlawful termination. Counsel further submitted that an award of Kshs 4,000,000/= would adequately compensate the claimant for discrimination on account of pregnancy.
  13. Mr. Mwangi for the respondent on the other hand submitted that the petitioner was lawfully terminated from her employment for absconding duty. In this respect Counsel relied on the case of *Walter Ogal Anuro v Teacher Service Commission* [2013] eKLR and submitted that the respondent had proven to the court that it met the requirements before terminating the petitioner's employment. The petitioner was dismissed for absconding duty from 30<sup>th</sup> January, 2019 to 4<sup>th</sup> February, 2019 without notifying the manager on duty at that time. Section 44(4) of the *Employment Act* entitled the employer to summarily terminated an employee's contract for absence from duty without leave or other lawful cause.
  14. Mr. Mwangi further submitted that the respondent followed the rightful procedure as provided for by the law and it's Employee handbook before and during the termination of the petitioner's employment. In this regard, counsel relied on the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR.



15. According to Counsel the respondent had shown at paragraph 20 of the Replying affidavit that its employees made efforts to reach the petitioner through her phone but their efforts were fruitless as the petitioner was not picking calls. The Respondent consequently initiated disciplinary action against the petitioner in accordance with the code of Ethics governing employees which was contained at pages 23 to 28 of the Employees handbook.
16. Regarding the question whether the petitioner was on sick leave, Counsel relied on the case of *Banking Insurance and Finance Union vs Barclays Bank of Kenya Limited* [2014] eKLR.
17. At no material time when the petitioner absconded duty was the respondent made aware by the petitioner about her pregnancy and or difficulties relating to her pregnancy. The petitioner did not produce a medical certificate as proof of her alleged sickness during the material period. The only medical report/document tendered by the petitioner as proof of her sickness indicated she was admitted in hospital between 16<sup>th</sup> March, 2019 to 18<sup>th</sup> March, 2019. This evidence according to Counsel was not admissible because at the alleged time she was no longer an employee of the respondent.
18. On the issue of leave, the claimant never applied for one during her employment. The petitioner was aware of the procedure for taking annual leave as provided under clause 7 of the Employment Contract.
19. On the issue of maternity leave, Counsel submitted that the petitioner alleged that she proceeded on maternity leave between August, and October, 2019 but the said allegation was baseless because the petitioner was no longer an employee of the respondent during the period.
20. The Court having summarized the pleadings and submission as above, identifies issues for determination to be:-
21. Whether the petitioner herein absconded duties to justify her dismissal from work.
22. Whether on the other hand the respondent terminated the petitioner's employment on account of her pregnancy.
  - a. If (b) above is correct was the action by the respondent amount to discrimination and become compensable outside the remedies provided in the *Employment Act*.
  - b. If (c) is correct, what is the quantum of such damages,
23. The matter was brought before this court as constitutional petition but as this court and superior courts have observed, not every issue brought before a court of law is a constitutional issue. It is important to figure out a threshold a matter ought to meet before it is considered as a constitutional question. This is intended to avoid raising statutory questions as constitutional issues. This was well set out in the now famous case of *Anarita Karimi Njeri v Attorney General* [1979] KLR 154 where the court stated that if a person is seeking redress from the court on a matter which involves a reference to the *Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, that provision said to be infringed and the manner in which they are alleged to be infringed. This has been reiterated in the case of *Kamlesh Mansukhlal Ramkji Pattni v The Attorney General* [2001] KLR, 264.
24. The petitioner herein alleged that the respondent terminated her services on account of her pregnancy hence discriminated against her. The Respondent referred this allegation and stated that the petitioner's service was terminated on account of absconding duties and that the claimant never made them aware she was pregnant or face pregnancy related complications. The Respondent further



- stated that by the time the claimant alleged she had proceeded on maternity leave, her service had long been terminated.
25. Section 45 of the *Employment Act* prohibits unfair termination of Employment. Section 46(a) further considers a termination in case of female employee, on account of pregnancy or reasons connected to her pregnancy an unfair termination. Section 49 of the Act provides for remedies for unfair termination.
  26. Whereas it is conceded that a termination on account of pregnancy is a form of discrimination hence falls within the purview of Article 27 of the *Constitution*, for it to arise above the statutory discrimination under Section 46 of the *Employment Act*, the petitioner ought to demonstrate that the discrimination or the acts alleged to be discriminatory were so obvious and egregious that no person in his right thought could do or omit to do such an act to a pregnant woman or one undergoing pregnancy related issues. In this particular case the claimant did not provide sufficient evidence or material to persuade the court that discrimination if any could not be adequately addressed by the provisions of Section 46 of the *Employment Act*. The court will therefore proceed to regard the claim as an ordinary claim.
  27. The respondent dismissed the petitioner on account of absconding duty. The petitioner on the other hand alleges that she was dismissed on account of her pregnancy. Both parties conceded that the petitioner was away on sick leave between 9<sup>th</sup> and 28<sup>th</sup> January. However according to the respondent, the petitioner never returned to work after her sick off. The petitioner however claimed that she reported to her Manager who after listening to her advised her verbally to stay home until she delivers but advised her to confirm this with the Human Resource Officer. According to the petitioner she saw the Human Resource Manager who also told her verbally the same. The respondent denied these allegations.
  28. The curious aspect of the petitioner's case is that during the year 2020, around March to be exact, she twice applied for employment with the respondent if it be true then the petitioner was authorised to be away from work until she delivered is alleged, one wonders why she would apply for employment yet her service according to her had not been terminated.
  29. The respondent refuted the allegation that the petitioner was on leave and stated that for the petitioner to have been validly on leave she had to log in her request at least two weeks prior to the commencement of the leave through employee self-services (ESS). In the event that the Human Resource information service system had challenges, the petitioner was required to apply for leave through the leave books at least one week before commencement of the leave. The petitioner did not refute this or provide any information or evidence that exempted her from this procedure that she had been verbally allowed to be away on leave and for such a long period of time.
  30. The petitioner alleged that during her period of absence her telephone, email and postal address were working yet the respondent never contacted her.
  31. The petitioner however did not also make a good account of herself and why she did not present a medical report and follow up treatment until 25<sup>th</sup> August, 2021 almost six months after the respondent had terminated her service.
  32. From the foregoing the court is persuaded that the respondent is justified in dismissing the petitioner on account of absconding duty and that a fair procedure was followed in the process.
  33. In conclusion the court finds and holds that the petition is without merit and the same is hereby dismissed with costs.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF JUNE  
2023**

**ABUODHA J. N.**

**JUDGE**

