



REPUBLIC OF KENYA



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**Wanjira v Computer Learning Centre (Cause 767 of 2019)
[2023] KEELRC 2528 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2528 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 767 OF 2019
MN NDUMA, J
OCTOBER 12, 2023**

BETWEEN

CHRISTINE WANJIRA CLAIMANT

AND

COMPUTER LEARNING CENTRE RESPONDENT

JUDGMENT

1. The suit was filed on 30/1/2020 by Christine Wanjira, C.W.1, the claimant seeking maximum compensation in terms of Section 49(1) and (4) of the *Employment Act*, 2007 for alleged unlawful and unfair termination of employment by the respondent.
2. C.W.1 testified that she was employed by the respondent as a Sales Accounts Manager and that she signed contract dated 1/2/2019. That she earned a gross monthly salary of KShs.91,9947.
3. C.W.1 testified that her employment was unlawfully terminated without cause and due process on 19/8/2019. That the respondent failed to pay her terminal benefits upon termination.
4. That the termination was malicious and timed to coincide with her maternity leave which in itself was illegal and unconstitutional.
5. That the termination was not officially communicated but was sent on a WhatsApp phone message demonstrating callousness and contempt.
6. That the allegations of poor work performance were false and far-fetched except that she had medical issues during pregnancy.
7. That the Court finds and declares that the termination was unlawful and unfair and grant her compensation as prayed.



8. Under cross-examination by Mr. Nyachoti for the respondent, C.W.1 stated that her contract had job description and quarterly targets from quarter two (2) in April, 2019. That she accepted the terms. That on 8/7/2019, she received a letter with a Performance Improvement Plan. That management was to assist her to achieve her target. That the PIP Plan was from 13/8/2019 and the letter of termination was dated 19/8/2019. C.W.1 admitted that on 5/9/2019, she received one month's salary in lieu of notice. C.W.1 said that she had not served for 13 months. C.W.1 said that her colleague C.W.2 had her employment terminated while 5 months pregnant. That she did not know any female colleague who went on leave prior to her termination but that other female employees were granted maternity leave after C.W.1 had filed suit.
9. C.W.1 stated that she was victimized upon informing the company of her pregnancy and imminent maternity leave. That she did this via an email to the Director which was copied to the Human Resource Manager and Sales Manager.
10. C.W.2 Peninah Mulee Mukosi testified that she worked with C.W.1 as a Sales Executive. That her employment was terminated by the respondent on 3/3/2019 for poor work performance. That at the time of termination, she was five (5) months pregnant. That the real reason for the termination was that she had been issued with a Performance Improvement Plan Programme, just like C.W.1 while she was pregnant.
11. That the respondent was profiling pregnant women unlawfully. That the Performance Improvement Plan programme was abrupt and unlawful. Under cross-examination, C.W.2 said she was employed on 1/6/2017 and was made to sign a PIP programme dated 14/12/2018. That the review was to be done in the year 2019. That she was pregnant at the time and had medical issues. That C.W.1 insisted that she was targeted because they knew she was pregnant. That she had taken a few sick-off days to go to hospital. That she then had her employment terminated for poor work performance. C.W.2 said that she queried the timing of the PIP and the termination. C.W.2 said she could only recall a daughter of Mr. Malu, a director of the respondent was granted maternity leave.
12. R.W.1 Aunally Maloo testified for the respondent. She stated that she was the Chief Executive Officer of the respondent.
13. That C.W.1 was employed by the respondent in January, 2019 as a Sales Accounts Manager with a gross monthly salary of Kshs.91,9947,
14. That despite C.W.1 being adequately qualified, she failed to perform her duties to the expected standards after her employment.
15. That in the circumstances, by a letter dated 8/7/2019, C.W.1 was notified by the respondent of her poor work performances and she was accorded ample time and opportunity to provide an explanation for her conduct which she did not respond to.
16. That consequently, and there being no improvement in her performance, her employment was terminated by a letter dated 19/8/2019 on grounds of poor work performance.
17. That the claimant's poor performance was discussed when she was put on PIP. That the claimant was paid her final dues set out in the letter of termination.
18. That C.W.1 had only worked for 7 months and her claim is not justified since she had not served the respondent continuously for a period of 13 months as provided under Section 45(3) of the [*Employment Act, 2007*](#).
19. That the termination was lawful and fair and the suit be dismissed with costs.



20. Under cross-examination R.W.1 said that C.W.1 was unable to explain why she could not meet the target.
21. R.W.1 denied that C.W.1 was discriminated on grounds of pregnancy. R.W.1 denied that she received an email from C.W.1 dated 7/8/2019 indicating that C.W.1 was pregnant and intended to go on maternity leave.
22. R.W.1 stated that the respondent has many female employees and they normally take maternity leave. R.W.1 said that respondent was not aware C.W.1 was pregnant when they placed her on PIP and conducted performance review.
23. R.W.1 stated that C.W.1 had completed her probation at the time of termination. R.W.1 stated that performance review of the claimant was done on 8/7/2019 but the claimant signed the letter on 13/8/2019. R.W.1 said that they did not keep minutes of Performance review meetings. She added that C.W.1 had undergone the first performance review 1 month prior to 8/7/2019. The one of 8/7/2019 was the 2nd one. That reviews were done quarterly. The next review should have been three months after 8/7/2019 in October, 2019. R.W.1 however admitted that C.W.1's employment was terminated on 19/8/2019. R.W.1 stated that C.W.1 did not receive any notice to show cause. R.W.1 stated that C.W.1 proceeded on maternity leave on 8/7/2019 and her termination was on 19/8/2019. R.W.1 admitted that C.W.2 Peninah was one of the employees. R.W.1 could not recall whether the employment of C.W.2 was also terminated while she was pregnant but stated that her employment was also terminated for poor work performance.
24. R.W.1 could not recall whether the letter of PIP dated 7/8/2019 was sent to C.W.1 physically or was on WhatsApp. R.W.1 read an email from her Human Resource Manager, one Emily in which she had cautioned that the respondent should not repeat what they had done to Peninah (C.W.2) by terminating her employment while she was due for maternity leave. R.W.1 conceded that Emily had written this email to other staff including the claimant. R.W.1 admitted that the claimant would have come back on 7/10/2019 from maternity leave. R.W.1 stated that the claimant was entitled to full pay while she was on leave.
25. R.W.1 stated that C.W.1 finished her probation on 14/3/2019. R.W.1 admitted that C.W.1 was on sick leave when she got the letter of PIP on 8/7/2019 and proceeded on maternity leave immediately thereafter. R.W.1 stated that Peninah withdrew her case against the respondent. That C.W.1 was paid one month salary and one month salary in lieu of notice upon her termination. R.W.1 confirmed that Emily was still working for the respondent. R.W.1 stated that their workers take maternity leave with full pay. That the suit be dismissed with costs.

Determination

26. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by C.W.1, C.W.2 and R.W.1. The issues for determination are:-
 - (a) Whether the termination of the employment of C.W.1 was for a valid reason following a fair procedure.
 - (b) Whether C.W.1 is entitled to the reliefs sought.
27. The claimant submits that the timing of the termination is such that, the Court must conclude that it was disguised as one prompted by poor work performance when in actual fact, it was aimed at getting rid of the claimant on grounds of her pregnancy.



28. The claimant pointed to the drafting of the letter placing the claimant on a PIP on 8/7/2019, the day she took a sick-off arising from pregnancy complications and suspiciously, issuing the letter on 13/8/2019 six days after the claimant had requested the Respondent for maternity leave through an email dated 7/8/2019. R.W.1 denied having seen this letter, but the Court found this denial doubtful.
29. The claimant relied on the case of *British Leyland UK Limited -vs- SWIFT* (1981) I.R.L.R. 91 where the Court held emphatically that the correct test in unlawful termination matters was whether it was reasonable for the employer to terminate the employee's employment. The Court added that if no reasonable employer would have dismissed the employee then the dismissal must be found to be unlawful. The claimant submits that placing the claimant on PIP a day after she had applied for maternity leave, and proceeding to terminate her employment on grounds of poor work performance whilst she was on maternity leave was an action no reasonable employer would take and the Court to find that the real reason for the termination was invalid by dint of Section 43, 45 (c) and 46 of the *Employment Act*, 2007.
30. Furthermore, the action violated the claimant's right not to be discriminated upon on grounds of pregnancy provided under Section 5(3) of the *Employment Act* and Article 27(4) of *the Constitution* of Kenya, 2010.
31. The claimant further relied on the case of *Jane Wairimu Machira -vs- Mugo Waweru & Associates* (2012) eKLR, where the Court held that in cases where an employer cites poor performance as a reason for termination of employment, the employer must list elements of poor performance and the Court is to determine whether the listed elements constitute valid and fair reasons for termination.
32. Section 41 of the *Employment Act*, 2007 is also instructive on this as it provides:-
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
33. Courts have also held that, where an employer terminates employment of an employee on grounds of poor performance, the employer must in terms of Section 43(1) lay on the table the remedial targets it had set for the employee to achieve; the extent to which the targets were attained or not; the time frame within which the remedial programme is to be in place; the support measures put in place to help the employee achieve the set remedial targets and the consequences of failure to achieve the set remedial targets by a definite date. This is the conversation envisaged under Section 41 in the presence of a fellow employee or union representative. It is for the employer to demonstrate that it had set a meeting for the said explanation from the employer and the employee to take place before the employer makes a decision to terminate the employment.
34. The respondent in their submissions state that since the claimant had not served the respondent for a period of 13 months or more, she has no right to complain that her employment was terminated unlawfully or unfairly by the respondent in terms of Section 45(3) of the *Employment Act*.
35. The Court notes that this Section of the Act, was invalidated by the High Court in the case of *Samuel G. Momanyi -vs- The Attorney General and Another* [2012] eKLR. This decision remains in place and this Court continues to respect its finding in many of its decisions where this Court has held repeatedly that an employee who has served the probation period is entitled to the protection provided



to an employee in terms of the contract of employment itself and part V and IV of the [Employment Act, 2007](#) which govern Rights and Duties in Employment and Termination and Dismissal respectively.

36. In the present case, the respondent confirmed that the claimant had served three months' probation and was on the seventh month of employment at the time of termination.

37. The respondent submit further that the claimant has failed to adduce sufficient evidence as set out in the case of *Protus Wanjala Mutike -vs- Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021] eKLR* where the Court held:-

“It binds the Claimants at the onset to bring out the case of unlawful termination of employment to which the respondent shall adduce evidence in justification, failure of which a claim is lost....”

38. The respondent also relied on the Court of Appeal decision in *Jane Samba Mukala -vs- OL Tukai Lodge Limited – Industrial Cause No. 8 Jane Samba Mukala -V- Oitukai Lodge Limited Industrial Cause Number 823 Of 2010: [2010] LLR 255 (ICK)* where it was held:-

“The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance..... it will not suffice to stay that one has been terminated for poor performance as the effect leading to this decision must be established.”

39. In the present case, whereas, the contract of employment provided targets to be met by the claimant, no tangible evidence was placed by the respondent before Court indicating what particular targets the claimant did not meet, in what respect and extent. The respondent did not also demonstrate any remedial measures it had put in place to enable the claimant to meet the targets and within what period. Instead, the claimant gave a written request to go on maternity leave on 7/8/2019 and was handed a performance improvement programme on 13/8/2019 which was backdated to 8/8/2019, a day after she had notified that she would be proceeding on maternity leave. The Court finds that R.W.1 was not candid in her denial that she was aware that the claimant was pregnant and had made a request to proceed on maternity leave.

40. The assertion by the claimant that this action was aimed at getting rid of her before she went on her maternity leave was given credence by the testimony of C.W.2, a former colleague, who testified that her employment was terminated by the respondent on similar grounds of poor work performance as soon as the respondent had learnt that C.W.2, was pregnant.

41. Indeed, the timing of the issuance of the PIP via a WhatsApp on 13/8/2019 while the claimant was already on maternity leave followed by a letter of termination dated 19/8/2019 six (6) days later clearly, exposes, lack of good faith and genuine intention to improve the performance of the claimant, if at all, it was wanting in the first place. The claimant could not be expected to improve her sales performance while on maternity leave and within a period of six (6) days. There is no evidence that the respondent had any problem with the performance of the claimant before she notified of her intention to go on maternity leave on 7/8/2019

42. R.W.1 was indeed at pains to explain an email from Emily, the Human Resource Manager of the respondent who had expressed her misgivings on the respondent repeating the mistakes it had done, by terminating the employment of Sophia (C.W.2) upon disclosing her pregnancy to the respondent with regard to C.W.1.



43. The Court is satisfied that the claimant was clearly victimized on grounds of her pregnancy and her notification that she was about to go on maternity leave. Accordingly, the respondent violated the claimant's right not to be discriminated on grounds of pregnancy protected under Section 27(4) of *the Constitution* and buttressed under Section 5(3) of the *Employment Act*, 2007.
44. Accordingly, the respondent had no valid reason to terminate the employment of the claimant. The respondent violated Sections 41, 43, 45 and 46 of the *Employment Act*, 2007. The termination of the employment of the claimant was unlawful and unfair and the claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the *Employment Act*, 2007 and to damages for the violation of her constitutional right protected under Section 27(4) of *the Constitution* of Kenya, 2010.
45. The Court relies on the decision in *GMV -vs- Bank of Africa Kenya Limited* [2013] eKLR where the Court held that where an employee claims discrimination on grounds of pregnancy, the duty to prove that the discrimination did not occur shifts to the employer.
46. The respondent has failed to discharge its onus in that regard, to rebut the evidence of discrimination adduced by C.W.1 and C.W.2.
47. The Court relies on the decision in the case of *Yasmin Josephine Mokaya -vs- Professor Kithure Kindiki & Associates - Petition No 62 of 2019*; *GMV -vs- Bank of Africa Limited* (2013) eKLR and *VMK -vs- Catholic University of Eastern Africa* [2013] eKLR Cause No 1161 of 2010 to find that the claimant is entitled to damages for termination of employment based on discrimination on grounds of pregnancy and to so award without considering to award separate compensation under Section 49 (1) (c) and 4 of the *Employment Act*,
48. Accordingly, the Court has considered the salary earned by the claimant; the untimely curtailing of her employment while on maternity leave. That she lost her only means of income when she needed the money most and this is an aggravating circumstances in the case. The claimant lost advancement of her career as a young Sales Accounts Manager and has suffered loss and damage. The pain and suffering endured by a pregnant mother, already sick and on sick-off before embarking on maternity leave is easy for the Court to appreciate and consider in the assessment of damages to be granted to the claimant.
49. Accordingly, the Court awards the claimant a global sum of Three million Kenya Shillings (Kshs.3,000,000) as general damages for the violation of her constitutional rights under Article 27(4) read with Section 5(3) (a) of the *Employment Act*, 2007 by the respondent. The award is to be paid with interest at Court rates from date of judgment till payment in full.
50. Costs to follow the event.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 12TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

