



Nyabuto v Goodman Agencies Limited (Employment and Labour Relations Appeal E127 of 2022) [2023] KEELRC 2464 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2464 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E127 OF 2022**

**NJ ABUODHA, J
OCTOBER 11, 2023**

BETWEEN

VALERIA OLIVIA NYABUTO APPELLANT

AND

GOODMAN AGENCIES LIMITED RESPONDENT

(Being an appeal from the judgment, orders and decree of Hon. A.N.MAKAU (PM) issued in Chief Magistrate's Court at Milimani CMEL No.E253 of 2020 Valeria Olivia Nyabuto vs Goodman Agencies Limited issued on 30th June 2022)

JUDGMENT

1. Through a Memorandum of Appeal dated 16th July 2022, the Appellant appeals against the Judgment of Honourable A.N.MAKAU (PM) delivered on 30th June 2022 in Milimani CMELRC No.E253 of 2020 (Valeria Olivia Nyabuto v Goodman Agencies Limited.)
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in fact and in law in finding that the Respondent was unaware of the Appellant's pregnancy.
 - ii. The Learned Magistrate misdirected herself in law and in fact in determining that the Appellant's pregnancy had not been formally told to the employer.
 - iii. The Learned Magistrate erred both in law and in fact in failing to award the damages for termination on account of pregnancy.
 - iv. The trial Magistrate erred in law and in fact when it totally disregarded the Respondent's document dated 1st April, 2020 when making its decision as regards the issue of damages awardable.



- v The Learned Magistrate erred in law and in considering/disregarding the principles/tests set in determining discrimination on account of pregnancy.
3. The Appeal was disposed of by written submissions.
 4. The Appellant in its submissions dated 10th April, 2023 submitted on the duty of first appellate court and relied on the case of the renowned case of *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123.
 5. On the issue of whether the Appellant was obligated to formally notify the Respondent of the pregnancy, the Appellant submitted that the Respondent's attitude changed the moment she told her principal boss Dr.Khalid, sales manager, Florence and Human Resource Manager Rose Chesire on November,2019 that she was pregnant.
 6. Further when the Respondent terminated her in February 2020 the Appellant was 7 months pregnant and any reasonable man could see and know she was expecting and since she had two months to go she had no obligation to notify the Respondent under section 29(4) of the *Employment Act* hence the lower court erred in finding that no notice was given when time had not yet arrived for such notice.
 7. Counsel further submitted that the Respondent did not call the crucial witnesses the Appellant told about her pregnancy to refute her allegations and relied on section 63 of the *evidence Act* on oral evidence and that the Appellant was diligent enough to notify the Respondent to find a substitute who she could hand over during her maternity leave.
 8. On the issue of Respondent discharging statutory burden of proof to show that no discrimination took place on account of pregnancy as per section 5(6) of the *Employment Act*, the Appellant submitted that the Respondent did not discharge this burden and relied on section 109 of the *Evidence Act* and the case of Nairobi ELRC NO. 1227 of 2011 *GM V Bank of Africa Kenya Limited*(2013) eKLR on the requirements to proof discrimination.
 9. The Appellant further submitted that the Respondent did not have any justifiable reason as per section 43(1) of the *Employment Act*, was not given a show cause letter, she was not informed of the intended termination or taken through disciplinary hearing as per section 41 of the *Employment Act* and that the Appellant was terminated on account of poor performance with no evidence led by the Respondent to show the poor performance but the Respondent told the Appellant they were exiting Kenyan Market hence no specific reason for termination as the reasons must be in existence as per section 43(2) of the *Employment Act*.
 10. Counsel submitted that the Appellant was terminated on account of her pregnancy as she was the only employee in her department who always met her targets.
 11. On the issue whether the damages awarded were inordinately low counsel for the Appellant submitted that section 5(3) is against discrimination on account of pregnancy and section 49 guides on what the Appellant would get as compensation and relied on the cases, *Kenfright(EA) V Benson K. Nguti* (2019) eKLR, *Winnie Treezer Ochieng v Label(Craft) Ltd* (2021) eKLR and *Yasmin Joseph Mokaya v Professor Kithure Kindiki t/a Kithure Kindiki & associates*(2021) eKLR where court awarded 12 months, and six months compensation respectively hence submitting the trial court's award of two months' salary was too low and prayed for maximum compensation of 12 months.
 12. On compensation for discrimination against Appellant on grounds of pregnancy contrary to Article 27(5) of the *Constitution* and section 5(3) of the *Employment Act* counsel submitted that the court should award the Appellant exemplary damages of Kshs 3,500,000./= and relied on the above case of *GMV, Peris Nyambura v Dalbit Petroleum Limited*(2015) eKLR, *VMK V CUEA* 92013) eKLR



- and above case of Yasmin where courts awarded Kshs 3,000,000/=,3,600,000/=,5,000,000/= and 1,500,000/= respectively.
13. On the issue of unpaid mileage/car allowance for January & February (Kshs 110,000/=) and unpaid airtime allowance for January and February, counsel prayed for the same as per contract of employment and on gratuity he claimed for two years at Kshs 80,000/= since the Respondent had admitted the same and the unremitted pension contribution at Kshs 52,608.00 which was not remitted by Respondent.
 14. In conclusion counsel submitted that this court should set aside the trial court judgement as it awarded the Appellant less than what she pleaded and what was offered by the Respondent.
 15. On the other hand, the Respondent filed his submissions dated 23rd June, 2023 and submitted on the role of the first appellate court as stated above and relied on the case of [*Abok James Odera t/a A.J Odera & Associates v John Patrick Machira & Co. Advocates*](#)(2013) eKLR.
 16. The Respondent submitted that they were not aware of the Appellant's pregnancy and the burden was upon the Appellant to prove this fact under section 107/108 of the [*Evidence Act*](#) and that even though the Appellant had a medical report in her documents she did not call the maker of the report hence it was not admitted as evidence which is fatal and relied on the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* (2015) eKLR and section 35 of the [*Evidence Act*](#) on admissibility of documentary documents.
 17. The Respondent submitted that no evidence was adduced of either the pregnancy or notification to the Respondent of the pregnancy.
 18. On the issue of whether the Appellant was terminated on account of discrimination due to her pregnancy Counsel for the Respondent submitted that the Appellant did not prove that the reason for her termination was because of her pregnancy and relied on the case of [*GMV \(supra\)*](#) on what the Appellant needs to prove to cite discrimination on account of pregnancy and that the Appellant was terminated on poor performance as per employee appraisals for January and July 2019 which the Appellant acknowledged having received, read and signed.
 19. The Respondent further submitted that it was not aware or notified of the Appellant's pregnancy hence could not have terminated her employment on account of pregnancy to warrant the claim of discrimination.
 20. On the issue of awarded damages being inordinately low the Respondent submitted that the award of damages is discretionary which should be exercised judiciously and relied on the case of [*Kenya Revenue Authority & 2 others v Darasa Investments Limited*](#)(2018) eKLR and [*Butt v Khan*](#)(1981)KLR 349 that court should not interfere with such discretion unless it is to low or too high leading to erroneous estimates.
 21. Further counsel for the Respondent submitted that the wording in section 49 is may hence not mandatory and relied on the case of [*Peter Muturi Njuguna v Kenya wildlife service*](#) (2017) eKLR and considerations to be looked at under section 49(4) of the [*Employment Act*](#) and submitted the same was fair considering the circumstances of termination and that the Appellant had worked with the Respondent for two years.
 22. Counsel further submitted that since the contract provided for one month notice or payment in lieu of notice and relied on the cases of [*Kenya Broadcasting Corporation V Geoffrey Wakio*](#) (2019) eKLR and [*CMC Aviation Limited v Mohamed Noor*](#)(2015) eKLR.
 23. On the issue of gratuity the Respondent provided that even though they had conceded to the same the trial court disallowed this prayer for being unsubstantiated and relied on the cases of [*Bamburi Cement*](#)



Ltd v William Kilonzi (2016) eKLR and *Kenya Kazi Services Ltd v Dickson Onjwaya Wasike & 42 Others*(2021) eKLR to submit that one is entitled to gratuity where it is provided for in the contract but in this case the Respondent submitted that the same was not provided for and despite the Respondent offering the Appellant the same she refused to collect it.

24. In conclusion the Respondent submitted that the trial court exercised its discretion judiciously and the court should uphold the same.

Analysis & determination

25. The duty of a first appellate court was well stated in the Court of Appeal in *Selle v Associated Motor Boat Company Limited* [1968] EA 123 thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

26. In determining the Appeal herein, this Court shall similarly seek to reanalyse the evidence tendered before the Trial Court vis-à-vis the court’s conclusion and disposition.

27. In this case, the judgment of trial court was as follows;

- a. one month’s pay *in lieu* of Notice –Kshs 80,000/=
- b. Unpaid salary arrears in February-Kshs 32,000/=
- c. Untaken leave-Kshs 24,000/=
- d. Unpaid car allowances, unpaid airtime allowances and gratuity-denied
- e. Compensation for unlawful and unfair termination 2 months –Kshs 160,000/=
- f. Damages for discrimination on account of pregnancy and subjecting the Claimant to mental torture, loss of three months’ maternity leave and lost medical benefits-denied
- g. Costs and interests of the suit.

28. From the grounds in the memorandum of Appeal and pleadings of the parties three major issues arise for determination. These are:

- a. Whether the reasons given by the Respondent for the Appellant’s termination is fair and justified.
- b. Whether the Claimant was terminated on accounts of pregnancy and discriminated on the same ground.
- c. Whether the damages awarded to the Appellant were inordinately low.

29. On the issue over the fairness of the reasons for termination, the Respondent in its termination letter alleges to have terminated the services of the Appellant on account of poor sales performance and produced caution letters dated 8th February, 2018, 3rd March, 2018, a warning letter of 4th April, 2018.



30. The Appellant was confirmed into employment vide a letter dated 7th September, 2018 after a successful probation where she was appraised on 10th January, 2019 and 2nd July, 2019 and the Respondent acknowledged that the Appellant was hardworking and the Appellant promised to work harder to meet her targets.
31. Three days after this last appraisal the Respondent issued the Appellant with a caution letter dated 5th July, 2019 and informed the Appellant that her performance was to be reviewed on 1st August, 2019. The Appellant denied receiving any caution letter after her probation and stated that no review was done on 1st August, 2019 or any other caution given to her up to the time of her termination on February, 2020.
32. The Court is therefore left wondering if the Appellant just performed so poorly and abruptly that she could not be placed on performance improvement plan before termination and why no review was done on her performance from the July to February when she was terminated.
33. It is noteworthy that the Reason for termination must be a valid and fair one as provided for under section 43 of the *Employment Act*, and the duty to prove the grounds lies with the Employer under section 47(5). Poor performance falls under categories of gross misconduct under section 44(4) of the *Employment Act*. The Respondent ought to prove this reason and show it existed with regard to the appellant.
34. In the case of *Peter Kamau Mwaura and Another v National Bank of Kenya* (2020) eKLR the court quoted *Jane Samba Mukala v Oltukai Lodge Limited* [2010] KLR 225 and observed that—
- “Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. 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.”
35. In the case of *Prof. Macha Isunde v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated:
- “There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
36. The Respondent therefore from the above cases had a duty to prove with certainty that the Appellant performed poorly to be terminated even without a warning or caution letter since most warnings and cautions were done while the Appellant was on probation and this was meant happen as she got used to her roles. She was confirmed in September, 2018 after successful probation when another caution letter was issued to her just three days after the appraisal on 2nd July, 2019. The appellant had earlier been appraised in January, 2020 and the appraisal was favourable. This appraisal was not produced by the respondent. To this extent Court is in agreement with the trial Court that termination on account poor performance was invalid.



Whether the Claimant was terminated on accounts of pregnancy and discriminated on the same ground.

37. The Appellant has maintained that she was terminated on account of pregnancy and that she was discriminated over the same contrary to article 27 of the Constitution and section 5(3) of the Employment Act. The Appellant maintained that she told her principal boss DR. Khalid, sales Manager, Florence Adhiambo and Human Resource Manager Rose Chesire in November 2019 of her pregnancy and was assured to go on her maternity leave smoothly. This communication was verbal. She further stated that she asked the same bosses for a replacement in order to train and hand over to when her maternity leave matures.
38. The Court notes that the Appellant had no duty to notify the Respondent of her pregnancy since the only requirement is on section 29(4) of the Employment Act when she would be proceeding on leave but at the time of her termination at 7 months pregnancy she had two months to go.
39. Section 63 of the Evidence Act provides for admissibility of oral evidence and since the Respondent did not call any of the above mentioned crucial witnesses the Appellant told about her pregnancy to refute the same, the Court believes her version of events.
40. The trial court refused to admit the sonographer report of 7th February, 2020 when the Appellant was around 7 months stating that she did not call the maker of the same but the Court is of the view that such a report did not require the maker too be called. Furthermore a seven month pregnant woman is physically recognisable by any reasonable person.
41. The Court is guided by the case of GMV Africa Kenya Limited (2013)eKLR where the court analysed this issue of discrimination on account of pregnancy as follows;

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 the 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, which states:

‘In any proceedings where a contravention of Section 5 (3) is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission is not based on any grounds specified in this Section.’

All the ladies are required 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. Courts have stated that the employee needs to:-

Establish she belongs to a protected class. Demonstrate she qualified for the job she lost. Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide prima facie proof, that other explanations by the employer are pretextual, and the real reason for termination was the pregnancy. Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy.

42. In this case the Appellant was pregnant a fact the Respondent denied but any reasonable person would notice a woman who is pregnant at seven months. The appellant therefore belonged to a protected class of people under the law, she qualified for the job she lost as she was the only one in her department, this termination adversely affected her since she lost the job when she needed it most and medical cover when she needed it most.



43. Once the Appellant proved her prima facie case the burden shifted to the Respondent to show a legitimate explanation for the termination. The Respondent ought to have proved or shown that the Appellant was dismissed due to poor performance and not her pregnancy. Failure to do so inevitably leads to the conclusion that the respondent dismissed the appellant on account of her pregnancy therefore discriminated against her.

Whether the damages awarded to the Appellant were inordinately low

44. It was the Appellant's case that the Learned Magistrate erred in law and fact in awarding her compensation of two 2 months for unfair termination when the *Employment Act* section 49 provides for 12 month's compensation and asked this court to review and set aside this award. Having found that the Appellant was terminated unfairly and the reason for her termination being her pregnancy, the Court will enhance the award to 12 months salary as compensation for unfair termination.
- i. There being no issue with payment of one month salary in lieu of notice, unpaid salary arrears for February and untaken leave the same should be allowed as per the trial court's award.
45. On general damages for discrimination on account of pregnancy having found that the Appellant was discriminated on account of pregnancy and awarded maximum compensation, this head of claim could only have been assessed independent of section 49 if it was demonstrated that apart from failure by the respondent to show that there existed no other reason for dismissal or termination, the respondent engaged in other overt and egregious actions that left no doubt that the respondent targeted the claimant for termination purely because of her pregnancy. This was not demonstrated. The Court came to the conclusion that the termination on account of poor performance was not proved leaving the most probable reason for termination to be on account of pregnancy which the respondent denied but failed to provide evidence to support their position. Further section 46(a) considers termination on account of pregnancy to be an unfair termination within the meaning of section 45 of the *Employment Act*. The trial Court was therefore right not to award damages on account of discrimination on account of pregnancy.
46. On the issue of unpaid car allowance and airtime allowance, even though the addendum to the contract provided for the same the contract under clause 1.5 provided that these allowances will be applied as per the Respondent's policies and procedures. The Appellant did not produce any evidence that she applied for the same hence the lower court was right in not allowing these prayers.
47. On the unremitted pension contribution the Appellant attached her pay slip and it was deducted from her salary hence the Respondent having not proved that it remitted the same should be awarded to the Appellant.
48. On the payment of gratuity for 2 years even though the Respondent had offered this before the matter came to court, it is noted the employment contract signed by the parties did not provide for the same apart from the pension contributions. The trial Court was therefore right in disallowing the claim.
49. On the prayer for loss of three months maternity leave and medical benefits, the Court notes that the employment contract is not lifetime engagement and could be terminated by either party for any reason or due to other unforeseen factors like death. These prayers fail and the Court is in agreement with the trial court's finding thereon.
50. In conclusion the Court hereby allows the Appeal in part as follows:
- a. One month's salary in lieu of notice-Kshs 80,000/=
- b. Unpaid salary arrears for February,2020-Kshs 32,000/=



- c. Untaken Leave...Kshs 24,000/=
- d. 12 months compensation for unfair termination-960,000/=
- e. Costs and interests of the suit and this appeal.
- f. Items (a), (b), (c) and (d) shall be subject to taxes and statutory deductions where applicable

51. It is so ordered

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2023

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

