



**Guantai v Lake Turkana Wind Power Ltd (Employment and Labour Relations Cause E967 of 2021) [2023] KEELRC 2978 (KLR) (17 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2978 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E967 OF 2021  
AN MWAURE, J  
NOVEMBER 17, 2023**

**BETWEEN**

**WINFRED MAKENA GUANTAI ..... CLAIMANT**

**AND**

**LAKE TURKANA WIND POWER LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Claimant filed a memorandum of claim dated 22<sup>nd</sup> November 2021.

**Claimants case**

2. The claimant states she was employed by the respondent on 1<sup>st</sup> June 2021 on a two-year renewable contract. She says she worked diligently but on 22<sup>nd</sup> October 2021 she was issued with a letter of “mutual separation”. She avers that at the time her annual salary was kshs 2,233,000/-. Meanwhile she says that by 30<sup>th</sup> September 2021 her probationary period expired.
3. She says she was evaluated and was advised her performance was exemplary and she was confirmed on permanent basis.
4. Claimant says on 2<sup>nd</sup> October 2021 she fell sick and was put on sick leave of two weeks by Mater Missecodie hospital and it ended on 16<sup>th</sup> October 2021.
5. Claimant says she reported back to work on 17<sup>th</sup> October 2021 and informed her supervision she was pregnant. She says from then she noted she was harrassed and discriminated by her employer.
6. The claimant avers that on 22<sup>nd</sup> October 2021 The Chief Executive Officer Mr Phillip Leferisk and Human Resource consultant invited her for an impromptu meeting and in that meeting they asked her to sign a letter which was strange to her. They informed her that her employment had come to an



- end. The claimant says the human resource consultant on learning that claimant had the office laptop informed her to await directors' directions when she would return the same.
7. The claimant says soon after her colleagues were informed she was no longer working for the respondent. She was then paid her final dues amounting to kshs 262,085/- only on 28<sup>th</sup> October 2021. Her salary for the 22<sup>nd</sup> days in October 2021 was also paid.
  8. The claimant said she was constructively dismissed and when her advocate wrote a demand letter the respondent threatened to dismiss her.
  9. She now prays the court to declare her termination under redundancy be declared unfair and she prays for her dues as per the memorandum of claim.

### **Respondent's Case**

10. The respondent filed a response dated 16<sup>th</sup> December 2021. The respondent avers that claimant's job was not unfairly terminated as she was terminated when she absconded from her employment from 30/10/2021. The respondent avers claimant salary was kshs 150,000 and 4,000 for telephone allowance. The respondent admits claimant was on 4 month's probation but was not evaluated and found exemplary as she alleges. He says no end of probation evaluation took place.
11. The respondent states the claimant never informed the respondent that she was pregnant. He says claimant sent her sick sheet to the human resource personnel on whatsapp but was not disclosed to the management because of confidentiality policy of the respondent. He says it was claimant's responsibility to inform the management of her sick leave.
12. The respondent states they never invited claimant for a confidential meeting but involved seven employees and discussed possible redundancy of some roles or a mutual separation. He says six employees agreed to the mutual separation. The respondent claims the mutual separation document was a draft agreement not a final document.
13. The respondent avers they called claimant back to work on 30/10/2021 but she did not report back to work hence she was dismissed on 22/11/2021. She was paid her terminal dues.
14. The respondent says the matter could be resolved through alternative dispute resolution.
15. The respondent says the mutual separation document was to offer better terms than the redundancy. They also say the chief executive officer and the HR consultant discussed with the claimant and informed her that her role was superfluous.
16. The respondent prays this claim which he claims is bad in law and an abuse of court process be dismissed with costs to the respondents.

### **Claimant's Evidence in Court**

17. The claimant gave her evidence in court on 1<sup>st</sup> March 2023 and she said she was served with a letter of mutual separation dated 22<sup>nd</sup> October 2021 but she did not sign it but was told to leave the premises. She says she left but on 1<sup>st</sup> November 2021 she was asked to resume duty but she declined as she and already been terminated. She says her advocate wrote a demand letter and she was asked to resume work.
18. She says on 24<sup>th</sup> November 2021 she filled her case and on 26<sup>th</sup> November 2021 she received her dismissal letter for abscondment.



### **Respondent's Evidence**

19. The respondent called the 1<sup>st</sup> witness on 16<sup>th</sup> March 2023 and that was Mr Basman. The witness worked for the respondent and he says claimant was not unfairly terminated by the respondent but she left employment. He says claimant was to resume work on 1<sup>st</sup> November 2021 but she did not do so and so was terminated for abscondment. The witness says he was a manager in Lake Turkana.
20. The witness says in cross examination he was aware that the claimant was pregnant and he got that information from the documents in the office.

### **Respondent Witness No2**

21. Lucy Wonduu is the second respondent witness who says she is a Human resource consultant of the respondent. She says as a consultant they recommended seven roles of the respondent be declared redundant and that included the claimant's position. She says the other six employees accepted the mutual separation but claimant did not accept the same and so was terminated on abscondment. The witness says claimant was paid kshs 380,000/- ex gratia and leave.
22. The witness says claimant was meant to be earning kshs 190,000/- per month after probation.
23. The witness says the offer to the claimant was one-month equivalent of leave, one month in lieu of notice, payment of leave days and phone allowance if she agreed to the mutual separation agreement.

### **Respondent Witness No 3**

24. The third respondent witness is Mr Leferenk and he is the respondent's chief executive officer. He says on 22/10/2021 they were trying to restructure their organisation as it was going through a rough time. He says they gave claimant their proposal but she was shocked and he advised her to go home and think about it. He says they gave her a separation agreement and next thing they got a letter from claimant's advocate.
25. He says they tried to get her back to work but she was not willing. They even wrote to her on 4<sup>th</sup> November 2021 but she did not agree. After they sent her a show cause letter which she did not respond to and on 22/11/2021 they sent her a dismissal letter. He says at dismissal claimant was paid kshs 380,000. He says her salary was kshs 150,000 but after probation it was to be kshs 194,000.
26. The witness says he was not aware claimant was pregnant. The witness says claimant was not paid the dues offered as she was dismissed.

### **Submissions**

27. The court considered the claimants submissions dated 8<sup>th</sup> June 2023 and respondent's submissions dated 3<sup>rd</sup> August 2023.

### **Analysis and Determination.**

28. The claimant was employed as per the contract of employment dated 25<sup>th</sup> May 2023 for a two-year contract up to 30<sup>th</sup> May 2023. She was placed on 4 months' probation up to 1<sup>st</sup> October 2021.
29. She avers that between 2<sup>nd</sup> October 2021 to 16<sup>th</sup> October 2021 she got sick and was admitted at Mater Miscrecodie Hospital. She says she informed her supervisor of her admission in hospital and upon discharge on 17<sup>th</sup> October 2021 she resumed work. She says she also disclosed to her Human Resource Consultant that she was pregnant.



30. On 22<sup>nd</sup> October 2021 the claimant says she was summoned by her chief executive officer Mr Leferink and the Human resource consultancy and was presented with a document referred as confidential mutual separation agreement which she was asked to sign. She says she declined to sign and she was ordered to leave the premises.
31. She says she was also told she would be informed when to return the office laptop. She says she left the premises and on 28<sup>th</sup> October 2021 she was paid her salary for that month and her final dues totalling kshs 262,085/-. The same included 1-month salary, accrued leave days and one month salary in lieu of notice.
32. The claimant then instructed her advocates to write a demand letter to the respondent by their letters dated 29<sup>th</sup> October 2021 and 3<sup>rd</sup> November 2021 demanding for compensation for unfair termination.
33. From the evidence on record on 4<sup>th</sup> November 2021 the respondent served claimant with a notice to show cause. This was despite the fact that on 28<sup>th</sup> October 2023 she had been sent a statement of her final dues. She was asked to show cause why disciplinary action should not be taken against her for absconding duty from 30<sup>th</sup> October 2021.
34. On 10<sup>th</sup> November 2021 she was invited for a disciplinary hearing on 16<sup>th</sup> November 2021 and finally on 26<sup>th</sup> November 2021 the claimant was summarily dismissed.
35. The evidence adduced via the pleadings as well as the documents produced and submissions show claimant was terminated from employment on 22<sup>nd</sup> October 2021 and that was against fair labour practices. This was crafted as a mutual separation agreement and when claimant refused to sign it she was asked to leave the premises. The witnesses admit there were other six employees who agreed to sign that mutual agreement and they exited employment from the respondent in an amicable way.
36. The claimant was however definitely constructively dismissed from employment. The respondent sent her terminal dues but when her advocate sent a demand letter to the respondent that is when they asked her to go back to work and sent her a notice to show cause. By then it was clear the train had already left the station.
37. The principles of constructive dismissal are well enumerated in the case of *Coca Cola East & Central Africa Ltd vs Marie Kagai Ligaga* (2015) eKRL where court held:
  - ” the legal principles relevant to determining constructive dismissal include the following:
    1. What are the fundamental or essential terms of the contract of employment
    2. Is there a repudiatory breach of the fundamental terms of contract through conduct of the employer.
    3. The conduct of the employer must be fundamental or significant breach going to the root of the contract of employment or which shows the employer no longer intends to be bound by one or more of he essential terms of the contract.”
38. It is clear the claimant had entered into a two-year contract with the respondent but the same was terminated barely five months later and the way it was terminated was by being coerced to sign a mutual separation agreement which she was not a part of.



39. There was no valid reason why the respondent wanted the claimant to be terminated from her employment. The respondent violated sections 45(1) of The *Employment Act* and sections 41(1) of the *Employment Act*.
40. There may be no proof that the termination by the respondent was directly connected to the claimant being pregnant but the fact remains the claimant was unfairly and unprocedurally terminated through constructive termination and without a valid reason.
41. The court is persuaded the claimant therefore was unfairly terminated as early as 22<sup>nd</sup> October 2021 and the other notices to show cause and eventual dismissal were a cover up to constructive dismissal which already happened in October 22<sup>nd</sup> 2021. In that regard, the court finds the claimant was unfairly terminated and the court is persuaded to enter judgment in her favour.
42. That being the case then the court finds the respondent should compensate the claimant. The claimant having worked for the respondent for only a few months the court will award her damages equivalent to three months equivalent of her salary. She is awarded damages for unfair termination at kshs 450,000/- plus costs of the suit. The other prayers are not justified and are declined.
43. She is also awarded interest at court rates from date of this judgment till full payment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

