



**Mbugua v Zakhem Construction (Kenya) Limited (Cause
2106 of 2016) [2022] KEELRC 22 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 22 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2106 OF 2016
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

LEAH WANGUI MBUGUA CLAIMANT

AND

ZAKHEM CONSTRUCTION (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Statement of Claim dated 3rd October 2016 2014 against the Respondent for unfair and unlawful termination of employment and discrimination based on gender and pregnancy. She avers that she was employed by the Respondent as a Document Controller on 20th May 2015, executed her employment contract on 24th June 2015 and was earning a gross monthly salary of Kshs. 50,387/- at the time of her termination. On events leading to termination of her employment on 26th November 2015, the Claimant avers that she was called by the Respondent's Personnel Manager on 22nd October 2015 and issued with a letter of termination without any explanation and was also informed to hand over to someone else whom she needed to train up to 26th November 2015 when her termination was to take effect. The Claimant's contention is that her employment was terminated after she informed the management in or around September 2015 of her impending Maternity Leave in December 2015.
2. The Claimant further avers that she made demand for an update of her House Allowance and NHIF payments but never received any response from the Respondent who was deducting her NHIF. She claims that she is entitled to her lawful terminal benefits plus unpaid dues having served the Respondent diligently for 6 months before the unlawful termination. The Claimant avers that she underwent mental torture when the Respondent terminated her employment due to her pregnancy and therefore claims three months maternity leave entitlement as an employee and general damages for discrimination on account of being a woman and being pregnant. She also seeks unpaid leave days, three months' salary in lieu of notice, damages for unlawful termination, refund of monies deducted



from her salary but not remitted to NSSF, NHIF and PAYE, certificate of service, P9A form for her KRA returns, interest, and cost of this suit.

3. The Respondent filed a Response dated 31st January 2019 averring that it employed the Claimant on temporary terms by a contract dated 24th June 2015 and that the contract duration was to last until completion of the Kenya Pipeline-Line 1 Replacement project or on termination by either party. The Respondent avers that the temporary contract also provided the Claimant's net pay as Kshs. 40,000/- with the gross salary at Kshs. 50,387/-. The Respondent avers that the Claimant however performed dismally and was issued with two warning letters on account of poor performance and absconding from work. The Respondent further avers that the Claimant's temporary contract was terminated by the requisite one month notice dated 22nd October 2015 and that her termination had no correlation at all with her pregnancy and neither did it victimize her as alleged. The Respondent avers that the Claimant's unsatisfactory performance at work and her absconding duty formed the reasons for her termination and that the right procedure was followed in terminating her employment. It is also the Respondent's averment that it duly remitted all statutory deductions on behalf of the Claimant and does not owe her any dues as demanded. The Respondent prays that the Claimant's suit against it be dismissed with costs.
4. The Respondent also filed two witness statements made by Eglyne Chepchirchir on 31st January 2019 and Lilian Ndunge on 19th April 2021. They both state that the Claimant refused to sign one of the warning letters issued to her dated 21st October 2015 and also deserted work one week prior to the effective termination date of her employment on 26th November 2015, thus forfeiting any entitlements owed to her. They state that the Claimant never filled the requisite form requesting for maternity leave and that her claim for three months' salary in lieu of notice is unfounded as her contract of service provided for one month's notice of termination.
5. The Claimant submits that the Respondent unlawfully, unprocedurally and unfairly terminated her from employment and did not act in accordance with justice and equity in terminating her employment as required under Section 45(4) of the *Employment Act, 2007*. The Claimant submits that the Respondent has not adduced any employment policy or practices to show to the contrary the procedure she ought to have followed to seek hospital leave and that the terms of engagement did not also disclose to her the Respondent's applicable policies in such circumstances, thus her absence from work. She further submits that the provisions under Section 41 of the *Employment Act* requires that questions of poor performance and gross misconduct be explained to the employee and reasons for termination be given in a language understood by the employee prior to termination of employment. She relies on the case of *Abraham Gumba v Kenya Medical Supplies Authority* [2014] eKLR where the Court held that poor work performance is an allegation that should be supported by evidence of specific performance targets, appraisal of the performance, with specific results. The Claimant submits that the Court in the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR held that there must be both substantive justification and procedural fairness for a termination of employment to pass the fairness test. It is the Claimant's submission that her termination was not anchored on substantive and procedural fairness. On substantive fairness, she submits that no valid reasons for termination were given by the Respondent in the termination letter and no investigations were conducted to conclusively say that she was in breach of her obligations as Document Controller. The Claimant submits that the Court of Appeal in the case of *Kenya Revenue Authority v Reuel Waitbaka Gitabi & 2 Others* [2019] eKLR held that the standard of proof is on a balance of probability and all the employer needs to prove are the reasons that it "genuinely believed to exist" causing it to terminate the employee's services. The Claimant submits that Section 43 of the *Employment Act, 2007* requires an employer to prove the reasons for a termination of employment; Section 45(2) of the Act requires the employer to prove that the reasons for termination of employment are valid and fair



reasons; and Section 47(5) of the Act obliges an employer to justify the grounds for terminating an employee. She cited the case of *Erick Kamau v New Kenya Co-operative Creameries Limited* [2018] eKLR in support of these submissions.

6. The Claimant further submits that when the second warning letter was issued to her for absconding duty, she was in hospital for examination of her pregnancy on 16th September 2015 as evidenced at page 13 of the Claimant's Documents. The Claimant submits that it is general knowledge that a pregnant woman occasionally gets antenatal care from the hospital and is once in a while away from work to attend the same and that this was the reason for her absence from work. She cites Article 27(4) and (5) of *the Constitution* of Kenya which provides for the right to non-discrimination on account of pregnancy and relies on the case of *G.M.V v Bank of Africa Kenya Limited* [2013] eKLR where the Court found that in any proceedings where a contravention of Section 5 of the *Employment Act 2007* is alleged, the employer bears the burden of proving that discrimination did not take place. It is the Claimant's submission that her termination was discriminatory as it was on account of her pregnancy, which was not a legitimate reason to terminate her employment. She refers the Court to Section 46(a) of the *Employment Act* which provides that a female employee's pregnancy or any reason connected with her pregnancy does not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty. It is the Claimant's submission that with these authorities, termination of her employment failed to meet the substantive fairness test.
7. On procedural fairness, she further submits that the *labour relations right* under Article 41 and due process and fair hearing under Article 47 of *the Constitution* are affirmed by the provisions of Sections 41 and 45 of the *Employment Act*. She submits that the Respondent issued her with two warning letters and not the three (3) stipulated under Clause 74 of the Respondent's alleged internal rules and was also never issued with a notice to show cause why she should not be dismissed for the allegations raised against her. The Claimant submits that a warning letter cannot be equated to a notice to show cause under Section 41 of the *Employment Act* as was affirmed by the Court in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* [2017] eKLR. Further, the Court in the case of *Rodgers Atuulo Ambasu v Budget Payless Car Hire & Tours Limited* [2019] eKLR stated that fairness cannot be equated to one being issued with a show cause letter only and that the respondent ought to have conducted a proper disciplinary hearing that is properly documented in form of minutes, to allow the both parties to conclusively air the grievances. It is the Claimant's submission that the Respondent did not adduce any evidence to show that a disciplinary meeting was conducted and thus failed to accord her a fair hearing.
8. The Claimant further submits that she is entitled to damages for economic injury and mental torture caused due to the unfair termination on account of her pregnancy. That having demonstrated that her termination was unfair for want of both substantive and procedural fairness she is also entitled to maximum compensation by the Respondent for unlawful, unprocedural and unfair termination as under Section 49 of the *Employment Act*. On this submission she relies on Industrial Court of Kenya at Nairobi, Cause Number 192 of 2013 *Moses Kaunda Moro v CMC Motors Group Limited* [2013] eKLR. The Claimant further submits that a certificate of service is a statutory right under Section 51(1) of the *Employment Act* as she was in employment with the Respondent for a period of six consecutive months. The Respondent did not file any Submissions.
9. The Claimant was not taken through the disciplinary process under Section 41 for her alleged poor performance. The Respondent miserably failed in executing the nefarious plan to dismiss her as the Respondent did not even attempt to follow its own internal procedures such as that laid out in Clause 74 of the Respondent's rules of discipline. The Claimant it is apparent suffered discrimination on



account of her pregnancy as well. The Respondent having failed to discharge its burden under Section 45, 47 and 43 of the *Employment Act* is liable to meet the following:-

- i. 6 month's salary as compensation for the unlawful termination – Kshs. 302,322/-;
- ii. Kshs. 500,000/- for the discrimination she suffered on account of her pregnancy;
- iii. Costs of the suit;
- iv. Interest at Court rates on the sums in i) and ii) above from the date of judgment till payment in full;
- v. P9 for the relevant year to enable her file tax returns and failing which the Respondent should be reported to KRA for non-compliance.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

Nzioki wa Makau

JUDGE

