



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 81 OF 2019**

**FLORA KALAMBA KATEMBO.....CLAIMANT**

**- VERSUS -**

**COASTAL BOTTLERS LTD.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)**

**JUDGMENT**

The claimant filed the memorandum of claim on 13.11.2019 through Thabit, Wampy and Kitonga Advocates and alleging unfair termination, discrimination based on pregnancy and non-payment of terminal dues and contractual benefits.

The claimant claimed for:

- a) Pay up to 03.08.2019 Kshs.22, 000.00.
- b) House allowance Kshs. 3, 000.00.
- c) Unutilised leave days (12 days) Kshs. 88, 000.00.
- d) Payment in lieu of notice Kshs. 250, 000.00.
- e) Compensation for unfair termination Kshs. 3, 000, 000.00.
- f) Total claim Kshs.3, 363, 000.00.

At the hearing of the suit parties entered a partial consent order thus:

- 1) By consent partial judgment is hereby entered for claimant against the respondent for payment of Kshs. 197, 536.00 by 15.01.2022 (failing interest to run at court rates from today).
- 2) The rest of the claim to go to full determination and the agreed issues for determination being:
  - a) Whether non-confirmation amounted to unfair termination.
  - b) Whether there was discrimination on account of pregnancy.
  - c) Issue of compensation, damages for discrimination and costs and interest.

By that consent claims (a) to (d) were thereby dispensed with.

It is not disputed that the respondent employed the claimant as the Regional Sales Manager on 04.02.2019 until 04.08.2019 when the claimant alleges she was unfairly terminated. The letter of appointment was dated 04.02.2019 and the monthly salary was Kshs. 250, 000. the appointment was effective 04.02.2019. The duration of the contract was envisaged to be for one (1) year and automatically expiring on 31.01.2020. The probationary clause stated, “**You will be on probation for a period of six months. On satisfactory completion of the**

**probation period, your services will be confirmed. Upon satisfactory completion of the said period and subject to your performance which will be evaluated from time to time.”**

It is her case that she performed diligently and met the targets so that as at July 2019 sales were at 94% of set target being 7% improvement to same period in 2018 being increment of 139, 628 cases of soda sold. she pleads that despite numerous reminders to the human resource manager and the CEO, she was not subjected to performance appraisal. Thus, the letter of non-confirmation shocked her.

The non-confirmation letter was dated 22.07.2019 and stated as follows:

**“Dear Flora Katembo,**

**RE: NONE CONFIRMATION**

**We refer to your letter of appointment dated 4<sup>th</sup> February 2019.**

**Your probationary period is ending on 3<sup>rd</sup> August 2019. Having assessed your performance over the period, Management have found it prudent not to confirm you in your appointment.**

**This notification is issued to you without prejudice.**

**On that basis, you will be paid all your terminal dues which includes salary up to and including to 3<sup>rd</sup> August 2019, pending leave and balance of probationary notice referred to under clause 15 of the contract.**

**The above payments will be subject to deduction of any company liabilities, statutory payments and having proper clearance in place by various process owners.**

**We wish to thank you ones again for the services you have rendered to this company and wish you well in your future plans.**

**Yours faithfully,**

**Signed**

**Ibrahim El Khoury**

**Chief executive officer”**

The letter required the claimant to sign as having read and acknowledging receipt but the exhibited copy is not so signed.

The claimant’s case is that the analysis of mid-year performance against the targets showed the performance had greatly improved so that the letter of none renewal contradicted that performance report. Further as at termination she was 7 months pregnant with her expected time of delivery estimated around 30.10.2019. Further, her termination was anchored on her pregnancy and was in violation of sections 29 on female employee’s entitlement to maternity leave with full pay and 49 of the Employment Act, 2007. Further the respondent’s CEO was her immediate supervisor and he had severally queried her informally referring to her ability to dispense her duties effectively in view of her prevailing condition and on commencement of her maternity leave. Further, upon receiving the letter of none confirmation she confronted the CEO on reasons cited in the letter and he implicitly mentioned her pregnancy limited her ability to effectively supervise her sales agents scattered within the respondent’s region. Thus she urges that the respondent took advantage of her ending probationary period to rid itself of what it viewed as a liability in view of pivotal role of the claimant’s position and the expected ‘**inconvenience**’ her overall condition would cause. She alleged respondent’s general conduct as unfair, unlawful and an insult to natural justice and discriminatory. She pleaded the particulars of discrimination as follows:

- a) Terminating the claimant’s employment on grounds that she could not effectively perform her duties due to her pregnancy.
- b) Paying the claimant lesser monthly salary compared to her male counterparts.
- c) Unjustifiably accusing the claimant of poor performance despite impeccable performance of the department the claimant headed and the alleged poor performance was a smokescreen to terminate her on account of her pregnancy.
- d) Incessantly enquiring from the claimant whether she would be fit enough to perform her duties while she was pregnant.
- e) Failing to conduct performance appraisal on the claimant due to her pregnancy so as to retain the respondent’s fanciful smokescreen of poor performance to terminate the claimant.
- f) For all intents and purposes subjecting the claimant to a hostile working environment for no other reason but for being a pregnant woman.

The claimant prayed for exemplary damages upon the following grounds:

- a) There exists no justification for the respondent's decision to terminate the claimant.
- b) The respondent's mid-year (February to July) performance and target analysis compared to same period in 2018 contradicts the allegations and reasons to terminate the claimant.
- c) The CEO's conduct and sentiments prior to the claimant's termination.
- d) The respondent's decision to terminate the claimant was so conspired in perverse mitigation to usurp its future duty and obligations to the claimant with regards to her unalienable maternity rights, in favour of the company's financial interest.
- e) The said termination letter was issued directly from the CEO's office and not through the human resource office per company policy.

The claimant prayed for judgment against the respondent for:

- a) A declaration that her termination by the respondent was unfair.
- b) Terminal dues as tabulated above (partly compromised per the partial judgement by consent at the hearing earlier referred to in this judgment).
- c) Damages for discrimination.
- d) Exemplary damages,
- e) Costs of the claim and interest thereon at court rates.
- f) Any other relief that the Honourable Court may deem fit to grant.

The respondent filed the memorandum of response on 12.03.2019 through Obura Mbeche & Company Advocates. The respondent pleaded as follows. While admitting that the respondent employed the claimant for a one-year contract as pleaded for the claimant, the respondent had previously employed the claimant as follows:

- a) Areas sales manager, Coast 2000-2002.
- b) Wholesale area manager 2003-2005.
- c) Key accounts manager 2004-2006.
- d) Area sales manager 2011-2014.

Further, the claimant's sales data was being compiled for February to August 2019 and the set targets against actual performance was negative performance except for April the variances being -7, 068, -58, 554, 46, 691, -25, 553, -55, 042, -24,806, -87, 282, and, -211, 613 respectively for February to August 2019. She was appraised in mid-July in view of her ending probationary period and she was scored 50-59% being fair and on account she had frequently failed to meet standards required of her. Her supervisor and the human resource manager signed the appraisal on 15.07.2019. Further the claimant declined to sign the appraisal in view of that score. Thus by the letter dated 22.07.2019 she was informed that she would not be confirmed. Thereafter the claimant cleared with the respondent and the failure to be confirmed was purely due to her unsatisfactory performance and it had nothing to do with her pregnancy. Further the respondent has instituted and implemented the Equal Opportunity Policy duly exhibited and does not condone any discriminatory practices as alleged for the claimant. The respondent exhibited the maternity leave report showing 12 employees took the leave between January to October 2019. Further the respondent's sales department has 80 male and 62 female employees and all are treated in a similar manner. The respondent denied that its officers implicitly or explicitly discussed the claimant's pregnancy. The respondent also exhibited its grievance policy and procedures and which the claimant never invoked in dealing with her alleged discrimination on grounds of pregnancy. Section 42 of the Employment Act, 2007 applies and the claimant's suit did not disclose a cause of action. The respondent prayed that the suit be dismissed with costs to the respondent.

The claimant replied the memorandum of response by reiterating the memorandum of claim. The claimant testified to support her case. The respondent's witness was Joseph Mwaniki Ng'ang'a (RW) the respondent's human resource manager since June 2019. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.

To answer the **1<sup>st</sup> issue** the parties are not in dispute that they were in a contract of service which was terminated by the letter of none confirmation in view of the ending six months' probationary period.

The **2<sup>nd</sup> issue** for determination is whether the non-confirmation amounted to unfair termination. The claimant testified that the letter of none confirmation did not state that her pregnancy was the reason for the none confirmation. The claimant also in reliance upon the summary of performance confirmed that the summary tallied with the variances of performance as pleaded for the respondent. The Court finds that indeed only in April 2019 did the claimant achieve a positive performance and for the other months February to July 2019 she had a negative performance – her 2019 performance versus target set being 94%. By her own evidence, the Court returns that as at time of none confirmation, the claimant has confirmed that as per the letter of none confirmation, her performance had been assessed and found

unsatisfactory. The Court considers that if meeting the set targets was 100% then at 94 % the claimant had not met the targets as set. The claimant relies on the CEO's email of 25.03.2019 to urge that the CEO stated that the human resource manager was to renew the contract of all employees above 85% for 6 months. However, the Court finds that the email was on 25.03.2019 about renewals as at that time and further, renewal of contract is clearly different from confirmation flowing from satisfactory probationary service. The Court finds that the email was therefore not applicable to the ending claimant's probationary service and if she would be confirmed in that regard. The court has considered the appraisal that is exhibited by the respondent and which the claimant says she only saw it in court. The Court has considered that the claimant did not sign the none renewal letter and as urged for the respondent, she appears to have developed a habit of not acknowledging receipt of the respondent's correspondence and on a balance of probability, the Court returns that she refused to acknowledge the appraisal or participate in the appraisal process which showed her unsatisfactory performance. As per RW's evidence, there is no reason to doubt that she met her supervisor, the CEO, for the appraisal but then refused to co-operate by declining to sign. While making that finding the court has considered that in the reply to the response, the claimant did not dispute the appraisal as exhibited or did not state she was seeing it in court for the first time.

The claimant also testified thus, **"I see page R.20. It says I did not meet the desired threshold for position I was engaged. It says I also declined to sign and acknowledge the appraisal. I did not agree to appraisal results. I refused to sign refusal to confirm letter because I had not been appraised."** By that evidence the Court finds that the claimant was appraised and she declined to sign because she did not agree to the result. As urged for the respondent, if the disagreement with the results was genuine, she ought to have invoked the instituted respondent's grievance management process but which she failed to do. While having declined to sign the appraisal, she in a contradictory manner testified that she refused to sign the letter of none confirmation for want of appraisal. Such contradictory testimony leaves the claimant's case pathetically flaccid.

Thus, with a performance appraisal of 59% and 94% for actual sales, it cannot be said that the claimant had met her targets or performed satisfactorily, there being no other agreed satisfactory performance margin than meeting the sales or other targets 100%.

The **3rd issue** is whether there was discrimination on account of pregnancy. At paragraph 12 of the memorandum of claim the claimant pleads that the CEO queried her capacity to perform in view of her pregnancy, **"...albeit informally..."** The claimant then testified thus, **"It was severally told to me by the CEO that my job involved travelling from Malindi to Lunga Lunga to Taveta (All Coast) and in view of my pregnancy it was doubtful I would travel frequently. He wanted me to delegate and not go out on travel. As Regional Sales Manager was a senior position I reported to CEO. Many officers worked under me. Request to delegate was not consistent with the many things I needed to address. I did not think it was a grievance to go to grievance management process. Company policy was not discriminatory on pregnancy grounds."** By that pleading and evidence, the claimant has confirmed that in view of her pregnancy, the CEO was genuinely concerned about her condition and he even offered proposals such as invoking the management tool of delegation rather than the claimant travelling across the region. In the Court's opinion, there was nothing like discrimination on account of pregnancy on the part of the CEO but it was a genuine discussion by a good CEO proposing work arrangements in view of the claimant's prevailing situation. The Court considers that discussing the situation of pregnancy like in the instant case towards putting the affected employee's plight into a better work place performance environment cannot amount to discrimination on account of pregnancy. Indeed, the claimant by her own testimony has confirmed that she did not think that her discussions with the CEO amounted to a grievance worthy taking to or invoking the respondent's grievance management policy and procedures. The Court finds that the conversations between the CEO and the claimant in view of her pregnancy did not amount to discrimination. She testified further, **"I had full medical cover. Leave was granted. I was not treated differently."** The Court finds that her allegations that she earned lesser salary than her male colleagues is found empty without supporting evidence and the claimant has confirmed she was not treated differently. RW's testimony was thus, **"She never raised issue of discrimination with me. Coca cola is a global brand. We are fair. She wrongly thought that in view of her pregnancy, she was not confirmed."**

The Court upholds the respondent's case and submissions that there was no discrimination based on pregnancy or other ground such as sex or gender as was alleged for the claimant.

To answer the **4th issue**, the Court returns that in view of the findings on the foregoing 2<sup>nd</sup> and 3<sup>rd</sup> issues for determination, the claimant's residual claims and prayers are unjustified and are hereby declined. The court has considered all the circumstances of the suit and partes to bear own costs. While making that finding the court has considered that the amounts in the partial judgment by consent were already offered to the claimant prior to filing the suit and would not therefore entitle the claimant to any costs. In conclusion, judgment is hereby entered for parties with orders that the suit is determined and each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 1<sup>ST</sup> APRIL, 2022.**

**BYRAM ONGAYA**

**JUDGE**