



**Macharia v 680 Operations Limited (Petition 231 of 2019)
[2022] KEELRC 4122 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 231 OF 2019
MA ONYANGO, J
SEPTEMBER 27, 2022**

**IN THE MATTER OF VIOLATIONS OF ARTICLES 27,
41 AND 47 OF THE CONSTITUTION**

AND

**IN THE MATTER OF BREACH OF SECTIONS 4 AND 6
OF THE FAIR ADMINISTRATIVE ACTION ACT**

AND

**IN THE MATTER OF BREACH OF SECTIONS 5, 17, 18,
29, 35, 41, 43, 45, 46 AND 51 OF THE EMPLOYMENT
ACT, 2007**

BETWEEN

LILIAN MUTHONT MACHARIA PETITIONER

AND

680 OPERATIONS LIMITED RESPONDENT

JUDGMENT

1. The Petitioner herein filed the instant Petition dated November 12, 2019 and filed in Court on December 5, 2019 seeking the following reliefs: -
 - a) Certificate of service within 7 days of the judgment
 - b) Kshs 256,674.94/- terminal dues comprising of the following: -
 - i) One month’s salary in lieu of notice.....Kshs 39,692.00



- ii) Salary for the month of June, 2019 Kshs 39,692.00
 - iii) Salary for 22 days for July 2019 Kshs 29,107.47
 - iv) 18 days accrued leave Kshs 23,815.20
 - v) 7 days of public holidays worked Kshs 9,261.47
 - vi) 2 off days not taken Kshs 2,646.13
 - vii) Gratuity 4 years of service Kshs 79,384.00
 - viii) 25 days leave days worked .Kshs 33,076.76
- Total Kshs 256,674.94
- c) Kshs 595,380/- compensation for unfair termination and loss of maternity leave as itemized below: -
 - i) 3 months loss maternity leave Kshs 119,076.00
 - ii) 12 months damages for unfair termination Kshs 476,304.00

Total Kshs 595,380.00
 - d) General damages for violation of the Petitioner’s rights from discrimination on account of pregnancy under Article 27 of the Constitution
 - e) General damages for violation of the Petitioner’s rights to fair labour practices under Articles 41 of the Constitution.
 - f) General damages for violation of the Petitioner’s right to fair administrative action under Article 47 of the Constitution
 - g) Costs
 - h) Interest at Court rates on (b) above from July 22, 2017 and on c), d), e), f) and g) from date of judgment until payment in full.

Background

2. The Petitioner avers that she was employed by the Respondent in the position of front office cashier and receptionist earning a monthly salary of Kshs 39,692.00/-.
3. The Claimant further avers that during the subsistence of her employment contract she performed her duties diligently and to the Respondent’s satisfaction until July 22, 2019 when she alleges that her employment was unlawfully and unfairly terminated on the alleged grounds of gross misconduct. The Petitioner denied any wrong doing, maintaining that she had a clean record without any disciplinary issues or complaints.
4. She avers that while on maternity leave on June 28, 2019, she received a letter dated June 25, 2019 suspending her from employment with immediate effect and without pay effective from June 24, 2019 to July 7, 2019 to pave way for investigations over an alleged fraud and theft. She was further informed to report to the Respondent’s unit manager on July 8, 2019 for further instructions.
5. Upon receipt of the suspension letter the Petitioner wrote to the Respondent informing it that she had already proceeded for maternity leave and requested to resume duties upon completion of her maternity leave.



6. The Petitioner posits that she received yet another letter from the Respondent dated July 8, 2019 extending her suspension to July 21, 2019. In the said letter the Petitioner was required to show cause why the Respondent's management should not take actions against her for the alleged loss of revenue to the Respondent and to report to the Unit Manager on July 22, 2019 for further instructions.
7. The Petitioner states that she responded to the suspension letter on July 16, 2019 indicating that the suspension was unnecessary as she was already on maternity leave and would therefore not interfere with any investigations. She further denied any involvement in any fraudulent activities and requested to resume duties upon the completion of her maternity leave. The Petitioner further sought to be paid her salary for the month of June, 2019 which at the time had not been paid.
8. The Petitioner nonetheless reported for duty on July 22, 2019 only for her to be served with a letter of dismissal dated July 22, 2019 terminating her employment on the grounds of her alleged involvement in front office operations that led to loss of revenue for the Respondent.
9. The letter required the Petitioner to hand over all company property in her possession and informed her that she would be paid her terminal dues including salary up to July 22, 2019, 18 accrued leave days, 2 off days worked, 7 days public holidays worked and gratuity for 4 years worked on condition that she signed an agreement to discharge and indemnify the Respondent. This was not done prompting the Petitioner to file the instant Petition seeking compensation.
10. The Petitioner avers that her rights as protected under Articles 27(4) and (5), 41(1) and (2) and 47(1) and (2) of the [Constitution of Kenya, 2010](#) have been violated by the Respondent.
11. She further avers that the Respondent's actions further violate the provisions of Sections 5(3)(a), 17(10), 18(4), (5), 29(1) and (2), 35(1), 36, 41(1) and (2), 45(1) and 46(1)(a) and (b) of the [Employment Act, 2007](#) as read with section 4 of the [Fair Administrative Actions Act](#).
12. The Petitioner prays that this court to find her Petition with merit and to allow it in terms of the reliefs sought therein.
13. In response to the Petition, the Respondent filed a Replying Affidavit deponed by Anne Muriuki, its Human Resource Manager, on February 24, 2022. The Respondents admits that it engaged the Petitioner in the manner alleged in the petition. The Respondent however maintains that the Petitioner's employment was lawfully terminated and for just cause.
14. The Respondent states that contrary to the Petitioner's contention of exemplary performance, the Petitioner performed her duties dismally and mishandled funds belonging to the Respondent resulting in the issuance of warning letters on July 25, 2015 for failure to follow procedure on cash related matters, July 27, 2015 for using her phone while on duty and lastly on July 13, 2018 for failure to seek authorization for a refund of cash to a guest.
15. The Respondent states that it suspended the Petitioner from duty on June 20, 2019 to pave way for investigation on suspected and/or alleged fraud /theft of funds at the front office. That it did conducted internal investigations by way of audit for the month of May, 2019 and June 2019 which revealed that the Petitioner had participated in fraud that resulted in loss of revenue.
16. The Respondent states that it initially required the Petitioner to report back to duty on July 8, 2019 before extending the period to July 22, 2019 following consultation with the Petitioner's union.
17. The Respondent states that the Petitioner alongside other suspended members of staff attended a disciplinary hearing along with a union representative on July 22, 2019 and were allowed to make representations prior to the Respondent making its determination on the issue.



18. The Respondent states that it took into into consideration the Petitioner’s representation prior to arriving at the decision to terminate her employment.
19. The affiant avers that the Respondent in the letter of summary dismissal to the Petitioner set out the Petitioner’s terminal dues along with a certificate of service. However the Petitioner did not collect the same from its offices.
20. The Respondent denied any discrimination on its part as alleged in the Petition. It maintained that the Petitioner’s employment was dismissed procedurally and for valid reason.
21. The Respondent urged this court to find the petition as filed devoid of merit and to dismiss it with costs to the Respondent.
22. The petition was disposed of by way of written submissions.

Submissions by the Parties

23. In her submissions the Petitioner maintains that her termination was unlawful and un-procedural. She further submits that the Respondent had no valid reason for the termination contrary to the mandatory provisions of Section 45 of the [Employment Act, 2007](#). She maintained that the reason of fraud as given by the Respondent was pre textual and has no basis.
24. The Petition submits that her termination was precipitated by her request for maternity leave. For emphasis the Petitioner relied on the Court findings in the Court of Appeal decision in the case of [Kenfreight \(EA\) Limited v Benson K Nguti](#) (2016) eKLR where the Court held that a termination is specifically unfair if it relates to sex or a female employee’s pregnancy or going on leave.
25. On the procedure followed, the Petitioner maintains that the Respondent failed to follow the mandatory procedure as set out under the provisions of Section 41 of the [Employment Act, 2007](#) as she was not accorded a fair hearing prior to the decision to terminate her employment was arrived at. She maintained no evidence of a hearing was availed for scrutiny by this Court and that in absence of such proof argues that no hearing as alleged took place. To buttress this argument the Petitioner cited the case of [Postal Corporation of Kenya v Andrew K Tanui](#) (2019) eKLR where the Court held that the requirements as provided for in Section 41 of the [Employment Act, 2007](#) must be met for a fair termination to suffice.
26. The Petitioner further submitted that she had established a prima facie case to prove her case of discrimination on account of her pregnancy. For emphasis the Petitioner referred this Court to the case of [GMV v Bank of Africa Kenya Limited](#) (2013) eKLR where the Court was of the view that where an employee establishes a *prima facie* case for discrimination there is a presumption and conclusion and the burden then shifts to the employer to rebut the presumption.
27. The Petitioner further submits that having proved that her termination was unlawful and unfair she is entitled to the reliefs as sought in her petition. For emphasis the Petitioner relies on the cases of [Postal Corporation of Kenya v Andrew K Tanui](#) (supra), [Kenfreight \(EA\) Limited](#) (supra), [Koki Muia v Samsung Electronics East Africa Limited](#) (2015) eKLR, [Geeta Joshi v Pandya memorial Hospital](#) (2019) eKLR, [Simon Gitau Gichuru v Package Insurance Brokers Ltd](#) (2017) eKLR and [VMK v Catholic University of East Africa](#) (2013) eKLR all on compensation for unlawful termination of employment.
28. The Petitioner further submitted that she is entitled to compensation for the loss of maternity leave as she was denied maternity as all her requests for the same were ignored by the Respondent herein. To fortify this argument the Petitioner relied on the case of [Mokaya v Kitbure Kindiki T/A Kitbure](#)



Kindiki & Associates (2021) eKLR where the Court held that a female employee is entitled to paid three months for maternity despite her unlawful termination.

29. The Petitioner further submitted that the Respondent's actions were in gross violations to the provisions of Section 5 of the *Employment Act* as read with Articles 27(4) & (5), 41 and 47 of the *Constitution of Kenya 2010* and therefore urged this Court for an award of Kshs 5,000,000/- as general damages on account of discrimination. For emphasis the Petitioner cited the cases of *GMV v Bank of Africa* (supra).

Respondent's Submissions

30. The Respondent on the other hand submitted that it had valid reasons to terminate the Petitioner's employment, that being that it had reasonable grounds to believe that she was involved in theft which in its view was tantamount to gross misconduct. The Respondent relied on the provisions of Section 44 of the *Employment Act, 2007* and the court findings in the cases of *Thomas Sila Nzivo v Bamburi Cement Limited* (2014) eKLR and *James Nyaga Samwel v Board of Governors, Kamuthatha Primary School* (2013) eKLR on summary dismissal.
31. The Respondent further submits that due process as provided under section 41 of the *Employment Act, 2007* was followed prior to the Petitioner's termination.
32. It maintained that the Petitioner was indeed invited to a disciplinary hearing on July 22, 2019, which she confirmed and attended in the presence of the shop steward and was accorded a chance to make her representations prior to her termination.
33. The Respondent further denied the Petitioner's contention that her termination was due to her pregnancy. It contended that no evidence was availed by the Petitioner to support this assertion. It is on this basis that the Respondent urged this Court to dismiss this claim. To fortify this argument the Respondent cited the Supreme Court decision in the case of *Samson Gwer & 5 Others v Kenya Medical Research Institute & 3 Others* (2020) where the Court was of the view that the burden of proving a fact lies with the party that alleges it.
34. A similar position was held in the case of *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others*, Petition No 5 of 2013.
35. On the reliefs sought, the Respondent submitted that the Petitioner is not entitled to any of the reliefs sought having proved that her termination was fair and lawful.
36. It further submitted that the certificate of service can be availed for collection by the Petitioner at any time.
37. In conclusion the Respondent urged this Court to dismiss the Petition herein with costs to the Respondent.

Analysis and Determination

38. Having considered the Petition, Affidavits, submissions and authorities cited by the parties the following are the issues for determination:
- a) Whether the Petitioner's termination of the was valid both procedurally and substantively;
 - b) Whether the Petitioner was a victim of discrimination on account of her pregnancy;
 - c) Whether the grievant is Claimant to the reliefs sought.



Whether the Petitioner's termination of the was valid both procedurally and substantively

39. Section 45(1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.

40. Flowing from the above mandatory provision of the law, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons(s) and upon following a fair procedure.

Reason for the termination

41. The reason cited for terminating Petitioner's employment herein is gross misconduct following her alleged involvement in front office activities that led the Respondent to financial losses. The Petitioner's letter for termination dated July 22, 2019 reads as follows: -

“Lilian Muthoni Macharia

FO Cashier – Castle

Staff No 2137C/O Operation 680 Ltd

Nairobi

Dear Lilian,

RE: Summary Dismissal

In reference to the Employment Act, 2007 section 44 (f) which states that “an employee commits, or on reasonable and sufficient grounds is suspected to having committed, a criminal offence against or to the substantial detriment of its employer or his employer's property” justifying summary dismissal.

You have been involved in Front Office Operations that have led to loss of revenue for the Company. This is gross misconduct justifying summary dismissal.

You have been requested to immediately hand over all company property through normal clearance procedures to your department head after which you will be paid your final dues as follows: -

- (a) Salary up to July 22, 2019
- (b) Eighteen (18) days on account of leave accrued
- (c) Two (2) days on account of normal off duty worked and not taken



- (d) Seven (7) days on account of Public Holiday worked
- (e) Gratuity Pay for four (4) years of service (15 days salary & 15 days house allowance at the rate of pay applicable at the time of separation)

Less:-

- (a) Kes.7,945/- (Amount paid in cash and not remitted accordingly)
- (b) Any debts owed to the Company

Yours Faithfully,

Operation 680 Ltd

(Signed)

G. Hirani

Director”

- 42. The Respondent maintained that it did conduct its investigations during the months of May and June 2019 and noted that the Petitioner along with other members of staff were involved in front office operations that led to financial loss, a fact that was vehemently denied by the Petitioner herein.
- 43. From the above the reason cited for the Petitioner’s summary dismissal is gross misconduct for her involvement in front office activities of the Respondent. However, Section 43 of the Act requires that the Respondent proves the grounds for termination which in this case was not proved. There was thus no proof of valid reason for termination.
- 44. I therefore find that the Respondent had a valid reason to terminate the Petitioner’s employment in line with the provisions of Section 45 of the *Employment Act, 2007*.

Procedure followed

- 45. Section 41 of the *Employment Act, 2007* provides for the procedure for a fair and valid termination. The Section provides as follows: -
 - (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.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
[Emphasis Added]
- 46. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held:
“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must



prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

47. In this case the Petitioner denies having been accorded a fair hearing prior to her termination. The Petitioner maintains that she was in fact on maternity leave and had sought to be allowed to report back upon the completion of her maternity leave.
48. The Respondent on the other hand maintained that it did conduct its investigations on front office operations and found that the Petitioner alongside other members of staff were culpable and thus summoned them to a disciplinary hearing.
49. There is a clear distinction between being recalled for a disciplinary hearing and reporting back to duty after maternity leave. The Petitioner therefore cannot hold that the process was unfair because she was recalled to attend the hearing while on maternity leave.
50. There is however no evidence that the Petitioner was invited for a disciplinary hearing or that she was informed of her right to be accompanied by a colleague or union official to the hearing. There is further no evidence that a hearing took place. The letter dated July 8, 2019 only advised the Petitioner that “You are instructed to report on July 22, 2019 at 02.00 pm to the Unit Manager for further instructions.”
51. The Petitioner testified that when she reported on July 22, 2019 she met the IT Supervisor who gave her the letter of termination. She testified that they did not discuss anything. The letter of dismissal does not refer to any hearing. The Respondent has further not adduced any evidence to prove that a disciplinary hearing took place. The termination was thus contrary to Section 41 of the Employment Act and therefore unfair.

Whether the Petitioner was a victim of discrimination on account of her pregnancy

52. The Petitioner maintains that she was a victim of discrimination on account of her pregnancy as she was forced to report to her supervisor while she was already on maternity leave. She further avers that her requests to report back once her maternity leave was over were dismissed by the Respondent.
53. The Respondent on the other hand denied any discrimination on its part maintaining that its actions were precipitated by an internal investigation that revealed that the Petitioner together with other members of staff were involved in front office operations that occasioned the Respondent losses.
54. The Respondent further maintained that due process was followed and that the Petitioner was not victimized in any way on account of her pregnancy.
55. No evidence has been availed by the Petitioner to prove that she was a victim of discrimination. She admitted that she had taken maternity previously and was not victimised. She also admitted that one of the colleagues who was also dismissed with her was also on maternity leave.
56. This was not an isolated case to the Petitioner alone but affected other members of staff as well. Further recalling an employee from maternity leave to attend a disciplinary hearing relating to matters that are not connected with maternity leave could not amount to discrimination.
57. In the circumstances I find that the Claim for discrimination on account of pregnancy has not been proved. The claim fails for want of proof.



Whether the grievant is Claimant to the reliefs sought

a) Certificate of service within 7 days of the Judgment

58. The Respondent is hereby directed to issue the Petitioner with a Certificate of Service by dint of the provisions of Section 51 of the [Employment Act, 2007](#).

b) Kshs 256,674.94/- terminal dues

59. Having found the Petitioner's dismissal unfair for want of fair procedure, she is entitled to terminal dues which I accordingly award her as itemized below:-

- i. One month salary in lieu of notice Kshs 39,692.00
- ii. Salary for the month of June, 2019 .Kshs 39,692.00
- iii. Salary for 22 days for July 2019 Kshs 29,107.47
- iv. 18 days accrued leave Kshs 23,815.20
- v. 7 days of public holidays worked Kshs 9,261.47
- vi. 2 off days not taken Kshs 2,646.13
- vii. Gratuity 4 years of service Kshs 79,384.00
- viii. 25 days leave days worked Kshs 33,076.76

Total Kshs 256,674.94

c. Kshs 595,380/- compensation for unfair termination and loss of maternity leave

60. Under this head the Petitioner is entitled to compensation for her unlawful and un-procedural dismissal. I have considered the factors under Section 49 of the [Employment Act , 2007](#), the circumstances of this case. It is my considered view that four months' salary is reasonable compensation in the circumstances. The Petitioner is thus further awarded Kshs 158,768/- as compensation for unfair termination.

61. The claim for loss of maternity leave however fails as the Petitioner went for her maternity leave up to the date of termination of her employment.

d. Prayers d), e) and f) on damages for violation of the Petitioner's rights under Articles 27, 41 and 47 of the [Constitution of Kenya, 2010](#)

62. These claims fail for want of proof.

e. Costs and Interest

63. The Petitioner is awarded costs of this petition and interest at Court rates from the date of this judgment until settlement in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER, 2022.

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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 Civil 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.

MAUREEN ONYANGO

JUDGE

