



REPUBLIC OF KENYA



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**Oichoe v Jilag Limited (Cause 83 of 2017)**  
**[2022] KEELRC 13488 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13488 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 83 OF 2017**  
**JK GAKERI, J**  
**DECEMBER 8, 2022**

**BETWEEN**

**JACKLINE OICHOE ..... CLAIMANT**

**AND**

**JILAG LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant initiated this claim by a memorandum of claim filed on January 18, 2017 alleging unfair termination of employment by the respondent.
2. The claimant avers that she was employed by the respondent as a cleaner on November 1, 2015 at a basic salary of Kshs 13,000/= per month.
3. That she performed her duties faithfully and diligently.
4. It is the claimant's case that she requested for permission to proceed on maternity leave from one Lorna, a Director of the respondent in the presence of one Lynette, the Manager who advised her to proceed on maternity leave on May 3, 2016 for 3 months. That she resumed duties on August 1, 2016 until her employment was terminated on August 19, 2016.
5. That on August 19, 2016, the claimant was summoned to the respondent's office and requested to return any company assets and clear with the administration and her employment was terminated by letter of even date.
6. The claimant alleges that her employment was terminated due to her pregnancy and maternity leave and her employment was terminated without notice or hearing and thus unfair.
7. The claimant prays for;
  - (i) Housing allowance  $^{15}/100 \times 13,000 \times 11$  months = Kshs 21,450/=



- (ii) Accrued leave days one month = 14,950/=
- (iii) Notice pay Kshs 14, 950/=
- (iv) Salary for May, June, July and August 2016 Kshs 59,800/=
- (v) Damages for unfair termination Kshs 179,400/=
- (vi) Damages for discrimination on ground of pregnancy Kshs 2,000,000/=
- (vii) Costs of the suit
- (viii) Certificate of service.

### **Respondent's case**

- 8. In its response filed on February 22, 2017, the respondent admits that the claimant was its employee at the salary alleged.
- 9. The respondent avers that the claimant did not inform the respondent of her condition nor did she apply for maternity leave. That she deserted duty but was welcomed back after she pleaded for pardon.
- 10. That the claimant's maternity leave did not crystallize as she did not apply for it.
- 11. It is the respondent's case that the claimant's employment was terminated because of a complaint filed by one of its clients and the dismissal was in accordance with the provisions of the *Employment Act, 2007*.
- 12. The respondent denies having dismissed the claimant from employment on account of pregnancy and maternity leave.
- 13. The respondent prays for dismissal of the claimant's suit with costs.

### **Claimant's evidence**

- 14. The claimant's written statement dated November 30, 2016 rehashes the contents of the memorandum of claim excluding the prayers.
- 15. On cross-examination, the claimant stated that her leave commenced on May 3, 2016 and completed a leave form. The written statement makes no reference to an application form or date of application for leave.
- 16. It was her testimony that no one else had proceeded on maternity leave or annual leave.
- 17. The witness testified that she was at work on April 30, 2016.
- 18. That she returned to the workplace on August 1, 2016 after maternity leave and completed the leave application form when she resumed in August 2016. The witness admitted that her written statement was silent on completion of leave application form.
- 19. That although her leave entitlement was 21 days per year, her claim was for the entire month.
- 20. On re-examination, it was her testimony that she was not paid for leave.

### **Respondent's evidence**

- 21. RWI, Lorna Nandi testified that she was the Managing Director of the respondent.



22. The witness further testified that the claimant absconded duty from April 30, 2016 without any communication about her whereabouts.
23. That the claimant neither informed the respondent of her condition nor apply for maternity leave, but absconded duty until June 2016 when she indicated that she was pregnant and had taken time off for maternity leave.
24. That when the claimant reported back on August 1, 2016, her performance was unsatisfactory as she was unable to meet her work obligations and was summarily dismissed on August 19, 2016.
25. The witness testified that the claimant's dismissal from employment was not related to the pregnancy or maternity leave.
26. On cross-examination, the witness confirmed that she employed the claimant in 2015 under a written contract but she absconded duty from April 30, 2015 and was unreachable on the phone but had no evidence of the call nor had she stated so in her statement.
27. That the claimant did not apply for maternity leave and the contract of employment had no express provision for maternity leave.
28. That the respondent had an internal procedure for applying for maternity leave.
29. That she spoke to the claimant when she came back.
30. The witness confirmed that no notice to show cause was issued and the letters addressed to the Labour Office were not copied to claimant and she was not taken through a disciplinary hearing.
31. That the salary of Kshs 13,000/= per month was basic salary with no provision for house allowance.
32. That the claimant did not take annual leave and was not at work in May, June and July and was not paid for the three months.
33. On re-examination, the witness stated that she had notified the labour office that the claimant had absconded duty and the claimant could not be paid for the period she was out of the work place and had not given any explanation and her phone was off and the respondent had no other way of getting to her as the claimant had no postal address.
34. RWI testified that when the claimant reported on August 1, 2016, she did not claim the amount not paid.

#### **Claimant's submissions**

35. The claimant identified four issues for determination namely;
  - (i) Whether due procedure was followed by the respondent in the summary dismissal of the claimant.
  - (ii) Whether termination of the claimant's employment was fair.
  - (iii) Whether the claimant was discriminated against by the respondent based on her pregnancy.
  - (iv) Whether the claimant is entitled to the reliefs sought.
36. As regards the process of termination of the claimant's employment, it was submitted that due process was not followed. Reliance was made on section 44 (1) of the [Employment Act](#), 2007 to urge that notice



- was required and none was given in this case. That section 41 of the Act was applicable in cases of summary dismissal.
37. The claimant argued that the allegations of poor performance were not brought to the claimant's attention.
  38. The decisions in Nicholas Otinyu Muruka v Equity Bank Ltd [2013] eKLR, Emmanuel Mambo Oduory v One Acre Fund [2020] eKLR and CMC Aviation Ltd v Mohammed Noor ([2015] eKLR and others were relied upon to reinforce the submission that due process was not followed.
  39. As to whether termination of employment was unfair, reliance was made on the provisions of section 41 and 45 of the Employment Act to urge that termination of the claimant's employment was unfair as the provisions were not complied with.
  40. As regards discrimination, it was submitted that the contract of employment had no provision for maternity leave and was thus in contravention of section 29 of the Employment Act.
  41. That the claimant asked for the leave application form but was told to proceed on maternity leave and completed the same when she reported in August 2016.
  42. That she was discriminated because;
    - (i) The contract had no provision for maternity leave.
    - (ii) Internal procedures were not availed in court.
    - (iii) Was not paid during maternity leave.
    - (iv) The claimant was given new terms when she reported back.
  43. Reliance was made on the provisions of article 27 (4) and (5) of the Constitution of Kenya, 2010 and section 5 (3) of the Employment Act to urge that the respondent led no evidence to demonstrate that it did not discriminate the claimant.
  44. The decision in GMV v Bank of Africa Kenya Limited [2013] was relied upon to buttress the submission.
  45. Finally, as regards the reliefs sought, it was urged that the claimant had proved that her dismissal by the respondent was unfair and was thus entitled to the reliefs sought including housing allowance, leave pay, notice pay and all reliefs itemised in the memorandum of claim.

### **Respondent's submissions**

46. The respondent identified three issues for determination; whether termination of the claimant's employment was unfair, whether she was discriminated by the respondent and entitlement to reliefs.
47. As regards termination of employment, the respondent stated that the claimant's contract had a 6 months probationary period lapsing on April 30, 2016 when the claimant absconded duty and did not resume until August 1, 2016 after pleading for leniency.
48. It is submitted that since the claimant absconded duty, the contract came to an end and she could not found an action on that contract.
49. Reliance was made to the decision in CMC Aviation Ltd v Mohammed Noor (supra) to urge that the claimant was only entitled to notice pay.



50. As regards the claim for discrimination, it was submitted that an allegation of a violation of the Constitution must be made in accordance with the principles enunciated in *Anarita Karimi Njeru v Republic* [1976 - 1980] KLR 1772 on precision of the Articles allegedly violated, manners of violation and the extent.
51. It was urged that the claimant adduced no evidence of discrimination. That having absconded duty, she could not be paid for the months of May, June and July 2016.
52. The decision in *Mumo Matemu v Trusted Society on Human Rights Alliance & 5 others* (2013) eKLR was relied upon to urge the standard of proof in constitutional petitions.
53. It was submitted that the contract of employment need not provide for maternity leave as it was a statutory right codified in section 29 of the *Employment Act*, 2007.
54. It was the respondent's case that it was not believable that the claimant was granted maternity leave effective May 3, 2016 and 7 days later, the employer notifies the Labour Office that she had deserted her place of work and when she reported on August 1, 2016, she did not make any claim for the unpaid salary.
55. It was submitted that the claimant's pleadings did not disclose grounds for discrimination.
56. Finally, as regards the reliefs sought, the respondent submitted that the leave days payable are 21 per year as opposed to the one month(s) salary claimed.
57. That the claimant was not entitled to the salaries for May, June and July because she deserted duty and had not notified the employer.
58. It was further submitted that the claimant was not entitled to damages for discrimination.
59. As regards compensation for unfair termination of employment, the respondent invited the court to consider the conduct of the parties and in particular the fact that although the claimant was entitled to maternity leave, she proceeded without having made an application for the leave to allow the respondent make the necessary arrangements for the duration she would be away.

## **Determination**

60. The issues for determination are;
  - (i) Whether the claimant absconded duty or proceeded on maternity leave.
  - (ii) Depending on the above, whether the claimant's contract of employment subsisted until termination on August 19, 2016.
  - (iii) Whether termination of the claimant's employment was unfair.
  - (iv) Whether the claimant is entitled to the reliefs sought.
  - (v) Whether the claimant was discriminated on the grounds of pregnancy and maternity leave.
61. As to whether the claimant absconded or deserted her place of work or proceeded on maternity leave, the parties have taken contrasting positions. While the claimant alleges that she proceeded on maternity leave on May 3, 2016, the respondent maintains that the claimant absconded duty from April 30, 2016.
62. The starting point is an analysis of the concepts of desertion and maternity leave.



63. *Black's Law Dictionary, 9<sup>th</sup> Edition* defines absconding or desertion as;
- “The wilful and unjustified abandonment of a person’s duties or obligations.
64. In the South African decision in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), the court stated as follows:
- “... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post subsequently formulates the intention not to return.”
65. In a similar vein, in *Felistas Acheba Ikatwa v Charles Peter Orieno* [2018] eKLR, the court held that;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
66. The claimant’s evidence is that on an unidentified date, she spoke to one Lorna, in the presence of one Linett seeking permission to proceed on maternity leave and was informed that she could start leave from May 3, 2016 and did so. Whereas Lorna testified for the respondent, Linnet did not. Lorna’s written statement is emphatic that the claimant absconded duty on April 30, 2016 and did not notify the respondent where she was and was unreachable on her cellphone number. The respondent led no evidence when the calls were made and by who or to which mobile number.
67. To buttress its position, the respondent relied on the letter dated May 10, 2016 to the labour office, Nairobi, received on even date informing the labour officer that the claimant Identification Number 26395217, had not reported to work for 7 days and had not communicated her whereabouts.
68. The letter was reticent on attempts to contact her and the outcome and was not copied to the claimant. The letter intimated that the responding would be taking disciplinary action against the claimant including summary dismissal.
69. Strangely, no action was taken until August 1, 2016 when a second letter was dispatched to the labour office, Nairobi informing the office that the claimant had gotten in touch sometime in June and had apologised for the disappearance.
70. That she had informed the respondent that she was pregnant and had taken off to deliver and sought leniency. The letter was categorical that the claimant had not communicated her condition to the respondent. That she had requested for financial assistance and Kshs 5,000/= had been forwarded to her on humanitarian grounds.
71. The letter further stated that the claimant had requested the respondent to consider allowing her back to work and forgive her and the respondent had on ex gratia basis agreed that she resumed duty under a new contract of service effective August 1, 2016.
72. The claimant did not controvert the contents of these two letters.
73. The claimant appears to confirm the fact that she reported back on August 1, 2016 but for different reasons i.e from maternity leave.



74. If the claimant's evidence was to be believed, it would mean that the respondent gave her maternity leave on April 30, 2016 and wrote to the Labour Office on May 10, 2016 about her desertion. In the courts view, this was highly improbable.
75. Instructively, the claimant's written statement made no reference to completion of an application Form for maternity leave. In oral evidence, she stated that she was told to fill in the form when she resumed duty.
76. Surprisingly, neither of the parties made reference to the non-payment of salary between 30<sup>th</sup> May and August 1, 2016.
77. Apart from the prayers and particulars of claim on the memorandum of claim, the claimant made no specific allegation that the respondent refused, failed or neglected to pay her salary in May, June and July 2016 and what measures she took as she took care of the new born. The claimant adduced no scintilla of evidence that she called or enquired or visited the respondent's offices for her salary.
78. Most puzzling, the claimant adduced no evidence to the effect that when she resumed from maternity leave, she claimed the salary for May, June and July 2016. These lapses would appear to complete the jigsaw puzzle.
79. Finally, if the respondent's letters were to be ignored, it would suggest that they kept the Labour Office apprised of non-existent circumstances which is again highly improbable.
80. Based on the evidence on record, the court is satisfied and finds that the claimant may have deserted the place of work on April 30, 2016 and may not have been proceeding on maternity leave as alleged.
81. However, although the respondent acted prudently by informing the labour office that the claimant had absconded duty, it did not push the process to its logical conclusion. The letter dated May 10, 2016 ought to have been followed with a notice to show cause or outright termination letter setting out the attempts made to communicate with the claimant and the outcome. See [Judith Atieno Owour v Sameer Agriculture & Livestock Limited](#) [2020] eKLR on the essence of a disciplinary process where an employee is alleged to have absconded duty. The respondent did not and went ahead to welcome the claimant back on August 1, 2016 before terminating the contract dated on November 1, 2015.
82. The proper procedure would have been to issue a notice to show cause to the claimant on August 1, 2016 and take her through the process and determine the issue conclusively by either terminating her employment or pardoning her, in which case she would have resumed duty on terms agreed upon by the parties.
83. Although the letter dated August 1, 2016 made reference to a new contract of service effective the same date, none was provided for the record and none had been executed on August 19, 2016 when the claimant's employment was terminated by the respondent.
84. Thus, although the claimant deserted the work place on April 30, 2016, the respondent adduced no evidence of the effort made to contact the claimant to resume duty or ascertain her whereabouts. (See [Simon Mbithi Mbane v Inter security Services Ltd](#) [2018] eKLR and [Joseph Nzioka v Smart Coatings Ltd](#) [2017] eKLR).
85. Similarly, the respondent did not terminate the earlier contract of service between itself and the claimant. The fact that the respondent welcomed the claimant back without any disciplinary hearing would appear to suggest that the earlier contract of service had not been terminated and the claimant was still its employee.



86. As regards the alleged maternity leave, while the claimant testified that she was advised to proceed on leave by Lorna in the presence of Linett, Lorna denied that the claimant notified the respondent that she was proceeding on leave, a position reinforced by the respondent's letter dated May 10, 2016 to the labour office, Nairobi.
87. Section 29 of the *Employment Act*, espouses the right of a female employee to maternity leave as follows;
- (1) A female employee shall be entitled to three months maternity leave with full pay.
  - (2) On expiry of female employee's maternity leave as provided in sub-section (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.
  - (3) . . .
  - (4) A female employee shall only be entitled to the rights mentioned in subsection (1), (2) and (3) if she gives not less than seven days notice in advance or a shorter period as may be reasonable in the circumstances of her intention to proceed on maternity leave on a specified date and return to work thereafter
  - (5) The notice referred to in sub-section (4) shall be in writing.
  - (6) A female employee who seeks to exercise any of the rights mentioned in this section shall, if required by the employer produce a certificate as to her medical condition from a qualified medical practitioner or midwife.
88. Evidently, section 19 (4) of the *Act* does not prescribe the form of notice. It would appear that any form of writing informing the employer intention to proceed on maternity leave from a particular date suffices.
89. From the evidence on record, it is clear that the claimant did not give a written notice as required by section 19 (4) of the *Act*.
90. On cross-examination, the claimant testified that she completed the leave application form when she reported in August 2016, an issue she did not raise in the written statement.
91. Needless to emphasize, section 19 (4) of the *Employment Act* places the burden of giving notice upon the female employee and she must do so in writing and specify the commencement date.
92. Intriguingly, neither the claimant's written statement nor the oral testimony intimated that the claimant had notified the respondent at anytime that she was pregnant for purposes of duty allocation or pre-natal programmes and for preparation that she would be away for at least 3 months.
93. Having found that the claimant did not comply with the requirements of section 19 (4) of the *Employment Act*, she was not entitled to the rights conferred by section 19 (1), (2) and (3) and could not have been on maternity leave.
94. As to whether the claimant's contract of employment with the respondent persisted until terminated on August 19, 2016, the court is satisfied that it did as the contract of service dated November 1, 2015 was never terminated or a new one entered into.



95. As to whether termination of the claimant’s employment was unfair, the provisions of the *Employment Act*, 2007 are explicit that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair. This is succinctly captured by the provisions of sections 41, 43, 44, 45 and 47 (5) of the *Act* and the Court of Appeal and this court have been consistent in their construction of the Act.
96. In *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, Ndolo J stated as follows;
- “ . . . For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
97. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR as well as *CMC Aviation Ltd v Mohammed Noor* [2015] eKLR.
98. Applying the foregoing propositions of law to the facts of the instant suit, it is evident that termination of the claimant’s employment by the respondent on August 19, 2016 did not pass the fairness test.

### **Reasons for the termination**

99. As mentioned elsewhere in this judgement, although the claimant deserted the work place on April 30, 2016, the respondent failed to demonstrate that it made reasonable efforts to contact her to report to work and she established contact, the respondent did not take her through any disciplinary proceedings. It opted to act leniently towards her.
100. The letter of termination dated August 19, 2016 stated that the summary dismissal was actuated by the claimant’s “poor performance on areas on attendance and inability to meet your work obligations.” Copies of the respondents daily service level check for June 6, 2016 and June 13, 2016 are attached as evidence of the claimant’s non-performance. The copy dated August 6, 2016 contain a comment to the effect that “your staff Jackline on 17<sup>th</sup> floor is not performing. Please change her”. The form is stamped by direct line assurance company limited and was signed by two persons including the supervisor. It is unclear as to who made the comment. The copy dated August 13, 2016 has a comment to the effect that “The non performance of our staff is noted and same has been moved to 18<sup>th</sup> floor. We will keenly monitor her progress”. The form has the respondent’s stamp. No other documentary evidence was attached.
101. Although the copies of forms on record show that the respondent had a form by which it monitored performance, it adduced no evidence of how good and poor performance were distinguishable from the daily service level check and whether it had a policy on performance appraisals or evaluation.
102. Similarly, it led no evidence that the clients comment was brought to the claimant’s attention at any time its general nature notwithstanding.
103. Closely related to the foregoing, there was no material before the court to suggest that the claimant was placed on any performance improvement plan or had a negative assessment thereafter.
104. In sum, a single comment by a client led to termination of the claimant’s employment before it was interrogated and efforts made to enhance the claimant’s performance.



105. As a consequence, the court is satisfied that the respondent has failed to prove on a balance of probabilities the reason for terminating the claimant's employment on the ground of poor performance was valid.

106. The emerging jurisprudence on termination of employment on the ground of poor performance was articulated in *Jane Samba Mukalla v Ol Tukai Lodge Ltd* [2010] eKLR where the court held that:-

“Where poor performance is shown to be the 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.”

107. In similarly, in *National Bank of Kenya Limited v Samuel Nguru Mutonya* [2019] eKLR, the Court of Appeal stated as follows;

“The reason advanced by the bank for terminating the respondent's employment was poor performance. In *Jane Samba v Ol Tukai Lodge* Cause Number 823 of 2010 (September 2013), the court observed as follows;

(a) . . .

(b) It is imperative on the part of the Employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one had been terminated for poor performance as the effort leading to this decision must be established.

(c) Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

(d) In the event a decision is made to terminate an employee, on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.” (See also *Peter Kamau Mwaura and another v National Bank of Kenya* [2020] eKLR).

108. The upshot of the foregoing is that the respondent has on a balance of probabilities failed to demonstrate that it had a valid and fair reason to terminate the claimant's employment as ordained by the provisions of section 45 of the *Employment Act*, 2007.

## Procedure

109. Section 41 of the *Employment Act* prescribes the procedural precepts to be followed in the termination of employment and as explained in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017], the procedure is mandatory.



110. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal expressed itself as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made.
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

111. In the instant case, RWI, Lorna Nandi admitted on cross-examination that no notice to show cause was issued to the claimant nor were the letters addressed to the labour office copied to the claimant. The witness was categorical that the claimant was not taken through any disciplinary hearing for the poor performance.

112. Based on the foregoing, it is finding of the court that the respondent failed to demonstrate that termination of the claimant’s employment was conducted in accordance with a fair procedure as provided by section 41 of the *Employment Act*.

113. In sum, having found that the respondent has failed to demonstrate that it had a valid and fair reason to terminate the claimant’s employment, and failed to show that it complied with the provisions of section 41 of the *Employment Act*, it is the holding of the court that termination of the claimant’s employment was unfair and unlawful within the meaning of section 45 of the *Employment Act*.

114. As to whether the claimant was discriminated, the starting point is the evidence on record.

115. In her written statement dated November 30, 2016, the claimant stated as follows;

“That the only reason that could give rise to my employment being terminated is my pregnancy and maternity leave that I took albeit with permission from the respondent’s person.”

116. In *Andrews v Law Society of British Columbia* 1989] 1 SCR 321, the court stated as follows;

“Discrimination is a distinction which whether intentional or not but based on the grounds relating to personal characteristics of individuals or group which has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”

117. Similar sentiments were expressed in *Peter K Waweru v Republic* [2006] eKLR.

118. In the instant case, the claimant on cross-examination testified that she proceeded on maternity leave alone and no other person had proceeded on annual leave.

119. More specifically however, apart from the allegation captured above, the claimant tendered no shred of evidence of how her pregnancy or the maternity leave contributed to the termination of her employment. She led no evidence of having disclosed to the respondent that she was pregnant.



120. From the evidence on record and according to the claimant, the issue only came up in April 2016 when she requested for permission to proceed on maternity leave, notice the respondent denied.
121. There is no evidence of an instance when the respondent is alleged to have acted in a particular manner or failed to act on account of the claimant's pregnancy.
122. As regards maternity leave, the claimant tendered no evidence that it was the sine qua non for the termination. It is unclear why the respondent had to wait for the claimant to resume duty and then terminate her employment if the maternity leave was the reason for termination of employment.
123. From the evidence on record, the claimant has failed to establish a nexus between the pregnancy and maternity leave and the termination of employment.
124. In the circumstances, it is the finding of the court that the claimant's allegation of discrimination by the respondent was not substantiated.

### **Reliefs**

125. Having found that the termination of the claimant's employment by the respondent was unfair and unlawful, I will now proceed to assess the reliefs that commend themselves for issuance.

#### **(i) House allowance Kshs 21,450/=**

126. The respondent led no evidence to prove that the claimant's salary was inclusive of housing allowance or an itemised pay statement as required by law to demonstrate how it was apportioned. RWI confirmed that the salary did not include housing allowance.
127. In the absence of evidence to demonstrate compliance with the provisions of section 31 of the [Employment Act](#), 2007, the prayer for housing allowance is mented and is awarded for the duration served.

#### **(ii) Accrued leave days - One month Kshs 14,950/=.**

128. Although the contract of employment provided that the claimant had a leave entitlement of 21 days per year, the claimant prays for one month's salary as leave allowance. Since leave is a statutory right and the respondent led no evidence that the claimant proceeded on leave, the claimant is awarded leave pay for the duration served of 5 months, 19 days.

#### **(iii) Notice pay**

129. The claimant's employment was terminated without notice and is accordingly awarded notice pay of Kshs 14,950/=.

#### **iv) Salary for May, June and July 2016**

130. The claimant led no evidence that indeed she had notified the respondent that she would be proceeding on maternity leave on a particular date in consonance with the provisions of section 29 (4) and (5) of the [Employment Act](#), 2007.
131. Evidence on record reveal that the claimant left the work place without notice until June 2016 when she intimated that she was on maternity leave which the respondent was unaware of. In essence, the claimant was not on maternity leave and did not render any services to the respondent during the months of May, June and July 2016 and no salary was due to her. Perhaps, that explains why she did not claim the same after she reported on August 1, 2016.



**The prayer is declined.**

132. However, the respondent adduced no evidence of having paid the claimant salary for the 19 days worked in August 2016. The same is awarded, only if it was not paid as promised by the termination letter dated August 19, 2016.

**(v) Damages for unfair termination**

133. Having found that termination of the claimant's employment was unfair for non-compliance with the provisions of the *Employment Act*, the claimant is eligible for the discretionary relief provided by the provisions of section 49 of the *Employment Act*.

134. The court has considered the fact that;

- (i) The claimant served the respondent for about 5 months and 19 days which is a fairly short time though it is unclear whether she wished to continue.
- (ii) The claimant left the work place without having notified the respondent about her whereabouts until June 2016.
- (iii) A complaint had been made against the claimant by one of the respondent's clients.
- (iv) The claimant contributed to termination of her employment.

135. In light of these circumstances, the court is satisfied that the equivalent of one (1) month's salary is fair.

**(vi) Damages for discrimination on ground of pregnancy Kshs 2,000,000/=**

136. Having found that the claimant failed to substantiate the allegation that she was discriminated on the ground of pregnancy and maternity leave, the prayer for damages is unsustainable and is accordingly dismissed.

**(vii) Certificate of service**

137. The claimant is entitled to a certificate of service by dint of section 51 of the *Employment Act*.

138. In the upshot, judgement is entered for the claimant against the respondent in the following terms;

- (a) Pay *in lieu* of notice Kshs 14,950/=.
- (b) Housing allowance for the duration served of 5 months and 19 days.
- (c) Accrued leave days for 5 months and 19 days.
- (d) Salary for 19 days of August 2016.
- (e) Equivalent of 1 month's salary.
- (f) Certificate of service to issue within 30 days of the date hereof.
- (g) Costs of this suit.
- (h) Interest at court rates from date of judgment till payment in full.

139. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF  
DECEMBER 2022

DR. JACOB GAKERI

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 *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.

DR. JACOB GAKERI

JUDGE

