



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.26 OF 2019

SWM CLAIMANT

VERSUS

HARDWARE TRADING STORE LIMITED.....1ST RESPONDENT

RAJU PATEL.....2ND RESPONDENT

JUDGEMENT

The claimant is a female adult, the 1st respondent is a registered company and the 2nd respondent is a male adult and the managing director of the 1st respondent.

The claimant was employed by the respondent in June, 2014 as a cashier.

The claim is that the claimant's employment was terminated by being forced to sign a resignation letter and on the grounds that she was pregnant and sought for maternity leave. That prior to being forced to sign a resignation letter she had been demoted for the reason that pregnant employees cannot be a face of the office.

The claim is also that the decision to terminate employment was made by the 2nd respondent who had been sexually harassing the claimant and adamantly refused to give in to his demands. Such decision was unfair on the grounds that the claimant refused to give in to sexual demands sought by the 2nd respondent resulting to her unfavourable treatment and causing her mental and physical torture; this was discriminatory on account of pregnancy to the extent that she was told that it was a privilege to keep her employment when pregnant; the respondent moved the claimant from front desk to the store allegedly to protect the image of the business and which was done without consultation or agreement of the claimant. The claimant could not be allowed to go on maternity leave and such leave resulted in dismissal from employment.

The claim is also that the termination of employment as discriminatory, unfair and in disregard of the claimant's fundamental human rights and she was not paid her statutory maternity leave. The claimant had been a dedicated employee and had no disciplinary record.

The claimant is seeking the following;

- a) *A declaration that the claimant's termination of employment on account of pregnancy amounted to a violation of the claimant's rights under section 5(3) of the Employment Act, 2007;*
- b) *A declaration that termination was in violation of the claimant's constitutional rights under article 27 and 41 of the constitution;*
- c) *A declaration that the claimant's termination was in violation of section 45 and 46 of the Employment Act and therefore unfair;*
- d) *A declaration that the termination was in breach of the claimant's contract of employment;*
- e) *A declaration that the respondent's forceful demands to the claimant to resign on account of being pregnant amounts to subjecting the claimant to servitude and hence unconstitutional;*
- f) *A declaration that the respondent's sexual harassment of the claimant amounting to both physical and mental anguish thus being unconstitutional and in breach of Employment and labour laws;*
- g) *A declaration that the claimant is entitled to compensation for:*

- Violation of her constitutional rights and envisaged under article 23(3) and 41(1) of the constitution;
- Violation of her employment, legal and contractual rights;
- Neglect and refusal by the respondent to fulfil contractual demands;
- Injury of the respondent on account of the respondent's breaches.

h) An order that the claimant be compensated as follows;

- Loss of 3 months maternity leave entitlement as an employee at ksh.48,000;
- General damages for discrimination on account of pregnancy and subjecting the claimant to servitude and mental torture on the grounds sexual harassment at Ksh.5,000,000;
- Salary in lieu of notice at Ksh.16,000;
- Severance pay on account of the claimant's excellent service at ksh.120,000; and
- 12 months compensation for wrongful termination at ksh.192,000.

i) Costs of the suit.

The claimant testified in support of her claim that she was employed by the respondent upon application and following a job advertisement in June, 2014. She started as a receptionist at a monthly wage of ksh.10,000 and where she worked diligently with gradual pay increments and last earning ksh.16,000 per month.

In the course of her employment, the 2nd respondent became extremely of bad conduct and behaviour towards her as he would say sexually inappropriate things to her that would make the working environment uncomformable. These would be words to suggest that he wanted sexual favours from the claimant which she chose to ignore for fear of losing her job which was her only source of income.

The claimant also testified that despite the inappropriate words to her by the 2nd respondent, on a date she cannot remember he grabbed her while leaving the washroom to suggest that he wanted something sexual from her but she managed to escape from his snares.

At another instance, the 2nd respondent spanked her on her buttocks, which action she found to be extremely demeaning and utterly disrespectful. This caused her great pain physically and mental anguish.

The claimant also testified that the 2nd respondent continued with his sexual connotation up and until he discovered she was pregnant. Things changed and he resorted to treating her as a baggage to the extent of demoting her from the front desk to the store room without consultation and consideration of her status. The claimant could do nothing since she needed her job and had to do as directed.

When the claimant asked to take maternity leave, she was informed by the 2nd respondent that it was a privilege that she had been allowed to work while pregnant and that she should sign a resignation letter as they do not give maternity leave to anyone.

The claimant refused to sign the resignation letter as she had no alternative but to leave employment since her baby was due for delivery.

The claimant also testified that she tried to talk to the respondent about her employment but learnt that she had been replaced. She sent a friend to the labour officer to make a demand and when the respondent failed to respond she knew her employment had been unfairly terminated.

The claimant also testified that there were several instances when the 2nd respondent sexually harassed her, at one time he grabbed her and A a causal employee saw him and asked why she allowed it to happen. He had asked A to come and testify but he declined since he is still in the employment of the respondent.

The claimant had informed the respondent that she was pregnant and preferred to work until end of July, 2018 and then take maternity leave. July was her month of taking annual eave and in June, 2018 the 2nd respondent asked her to take leave but she opted to work and take maternity leave.

That on 31st July, 2018 the 2nd respondent asked her if she had been paid and also asked her to sign a resignation letter since she was going on maternity leave and on the grounds that the respondent does not offer maternity leave but she refused to resign since she wanted to take her maternity leave.

The claimant consulted with the labour officer and who advised her to go to hospital and get 14 das sick off and if the respondent refused to sign it in approval, then she would know that her employment had been terminated. The claimant sent a friend to follow up on the case and leant that her employment had been terminated.

That she did not apply for maternity leave and the labour officer advised her that she had to show that a child had been born.

Upon cross-examination, the claimant testified that upon employment in June, 2014 her wage was Ksh.10,000 per month and which was increased over time with a gross wage of ksh.14,000 and her last working day was 31st July, 2018. She would be paid in cash every month end. She had 21 leave days and opted to work and be paid instead. She knew in August, 2018 would be her maternity leave month. The respondent accommodated her request to work in lieu of taking annual leave and allow her to take maternity leave from August, 2018 a she needed the money.

For 4 years she had not taken annual leave and opted to work and be paid.

That there was sexual harassment by Raju on dates she cannot recall. Such events occurred while her supervisor was on leave and she can recall two such occasions of sexual harassment. Her reaction to such instances of sexual harassment was to tell the respondent to stop. She also told a colleague. She knew such conduct was criminal but did not file a report with the police. She constantly told the 2nd respondent to stop as she was not interested in him but he failed to stop and she felt frustrated. She feared to lose her job and tried to apply to other places but was not successful.

The claimant also testified that she never applied for maternity leave or for sick off. She sent her boyfriend Mr Abdul to submit her demand letter and there was no reply. She did not receive her August, 2018 salary since she had already been dismissed from her employment by the respondent. She did not abscond duty as alleged in defence and her claims should be allowed.

Defence

In response, the respondent case is that the claimant was employed as a general worker and would help in preparing cash sales receipts and invoices when required and under supervision. She also assisted in cleaning and arranging goods when receiving and delivering goods to customers.

The claimant was not dismissed from her employment but absconded duty since being given maternity leave by the respondent. The claimant was supposed to take her 3 months maternity leave and then report back to work but has never resumed duty to date.

The defence is also that there was no termination of employment as alleged but absconding of duty upon being allowed to take maternity leave. The claims made against the 2nd respondent are denied and he only came to learn of the allegations made by the claimant through the labour officer's letter dated 17th September, 2018 and which did not detail any allegation with regard to sexual harassment and such issue has only arisen as an afterthought once the claimant approached her advocates which matter never occurred at the instance of the respondents' as alleged. The 2nd respondent never sexually harassed the claimant as the employer and he never received any complaint from her that she was ever harassed by any of her co-workers.

The defence is also that the 2nd respondent did not sexually harass the claimant or any other co-worker and no complaint was received from the claimant during the course of her employment with the respondents' and the labour officer did not register or receive any such complaints. Such claims are an afterthought.

The claimant was never discriminated against on the basis of pregnancy and she took her statutory maternity leave and was to receive full salary and was to be paid in cash as was practice but failed to attend at the office. The respondent was only surprised to receive summons relating to these proceedings.

The claimant was not demoted or treated differently as alleged since she was a general worker and would be allocated different duties on a needs basis. The claimant was allowed to take her maternity leave on full pay and opted not to report back to work.

Rajendra Patel the 2nd respondent testified that he is the managing director of the 1st respondent and the claimant was employed as a general employee in the year 2014 and helped in different areas.

In July, 2018 the claimant requested for maternity leave and which was approved and was to be paid.

He later received a complaint on 27th September, 2018 from the labour officer where the claimant was complaining that her salary had not been paid while she was on maternity leave. The claimant had not approached the respondent demanding for her salary and the practice was to present herself and be paid in cash. The respondent was always ready to pay the claimant while on maternity leave.

On 3rd October, 2018 the he responded to the labour officer and indicated the claimant had been allowed to take maternity leave and had been paid for her July, 2018 wages only to receive summons for these proceedings with outrageous allegations meant to tarnish the respondents. The demand letter was also copied to the police, Fida Kenya, Citizen TV, KTN and K24 media houses all meant to tarnish and threaten the respondent's reputation and duress against him as director. He has never sexually harassed the claimant and the first report she made to the labour officer such allegation was not made. These allegations only arose after the claimant met with her advocates.

Mr Patel also testified that he has never sexually harassed the claimant or any other employee of the respondent and no such complaint was made and this has only been an afterthought. There was no discriminating against the claimant due to pregnancy as alleged and was allowed to take her maternity leave with full pay and was to attend and be paid in cash. The claimant has never returned to work and opted to file suit. The claims made are not justified and should be dismissed with costs.

At the close of the hearing the parties filed written submissions.

The claimant submitted that there was unfair dismissal from employment when she got pregnant she discussed the same with the respondent and as time progressed, the 2nd respondent she was demoted and removed from the front office to the stores. In February, 2018 the claimant discussed her pregnancy with the 2nd respondent over her impending maternity leave and who stated that when the time was due leave would be granted. He was accommodative and the reason being he expected sexual favours. When the claimant sought leave, she was informed that the respondent does not allow maternity leave and issued with a paper to tender her resignation which she declined. She was told her services were not required.

In the case of **Maria Kagai Ligaga versus Coca Cola East and Central Africa Limited Cause No.611(N) of 2009** the court held that constructive dismissal occurs where an employee is forced to leave employment out of her own will.

The claimant also submitted that in the course of her employment she was frustrated in relation to the 2nd respondent seeking sexual favours from her and was forced to endure it for lack of alternative employment. The 2nd respondent kept on pointing at her pregnancy and that the respondents did were doing her a favour by keeping her in employment. section 29 of the Employment Act, 2007 (the Act) allow an employee to take maternity leave as held in **GMV versus Bank of Africa Kenya Limited [2013] eKLR** that employees discriminated against on account of their pregnancy need not strictly prove they were indeed discriminated against on such ground and a contravention of section 5 (3) of the Act is sufficient. The burden of proof is on the employer that such conduct did not take place.

There was sexual harassment of the claimant by the 2nd respondent contrary to section 6 of the Act. The claimant testified to the various incidents of sexual harassment where the 2nd respondent touched her inappropriately, pressed her breasts and spanked her buttocks in view of Andrew a casual employee and who was not able to attend and testify as he is still an employee of the respondents'. The claimant reported the sexual harassment incidents to the labour officer who advised that he had no jurisdiction to determine such matters and should ought to file her claims with the court.

In the case of **USIU versus Attorney General & 2 other Petition No.170 of 2012** the court held that this court has power to address constitutional violation and give a redress. In **J W N versus Securex Agencies (K) Limited [2018] eKLR** the court held that an employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker uses language whether written or spoken of a sexual nature. The claimant testified to the incidents of sexual harassment through spoken and physical harassment.

The claimant is entitled to compensation for unfair dismissal, pay during maternity leave, notice pay of one month, severance pay for years worked and damages for discrimination and sexual harassment. Courts have awarded ksh.5,000,000 for discrimination claims in the case of **G M V versus Bank of Africa Kenya Limited [2013] eKLR** for sexual harassment at the workplace an award of Ksh.500,000 and in this case an award of ksh.5,000, and 000 would be sufficient award.

The respondent submitted that the claimant was never dismissed from her employment. She was directed to apply for maternity leave, which was her right. There was no forced resignation as alleged but she failed to report to work as required and instead opted to file suit. Her work position was not replaced and has remained vacant. There is no proof that employment has been terminated as required under section 47(5) of the Act as held in **Hardley Mulanda & 53 others versus Giefcon Limited [2016] eKLR**.

The respondent has never discriminated against the claimant on account of her pregnancy and was ready and willing to abide the statutory provisions and allow the claimant to apply and proceed on maternity leave with full pay. The practice was to receive wages physically and the claimant has never returned for the same.

Being an employee of the respondent for over 4 years, the claimant was aware of how wages were being paid. Cash payments. The claimant failed to apply for maternity leave and or return to collect her wages.

In the case of **GMV versus Bank of Africa Kenya Limited [2013] eKLR** on a case of alleged termination of employment on account of pregnancy the court held that the employee had to prove that she was in a protected class and suffered adverse employment action directly or indirectly as a result of her pregnancy. Such is lacking in the claimant's case.

The respondent also submitted that there was no sexual harassment of the claimant by the 2nd respondent as alleged. No complaint was filed against any employee by the claimant. When she reported the matter to the labour officer, there was no complaint with regard to sexual harassment. Such complaint only arose when she instructed her advocates. Such is an afterthought and should be dismissed.

On the remedies sought, none is due and the claim is in abuse of court process and should be dismissed with costs.

On the pleadings, the evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there was sexual harassment of the claimant by the respondents';

Whether there was discrimination against the claimant on account of pregnancy;

Whether there was unfair termination of employment; and

Whether the remedies sought should issue.

Section 6 of the Act defines sexual harassment as where an employer or a representative of the employer or a co-worker:

(a) directly or indirectly requests an employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express

(i) promise of preferential treatment in employment; (ii) threat of detrimental treatment in employment; or (iii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken of a sexual nature;

(c) uses visual material of a sexual nature; or

(d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.

In addition, the same law requires that an employer with 20 or more employees to consult with the employees or their representatives if any, and to issue a policy statement on sexual harassment. Such a workplace policy should include among other matters a definition of sexual harassment; a statement that every employee is entitled to employment that is free of sexual harassment; a statement that the employer should take steps to ensure that no employee is subjected to sexual harassment; and a statement that the employer shall take disciplinary measures as they deem appropriate against any person who subjects any employee to sexual harassment. In addition to having a sexual harassment policy, the employer must ensure that the policy is implemented. Employers should and train their employees on the parameters of the policy as held in the case of **Lydiah Mongina Mokaya versus St. Leonard's Maternity Nursing Home Limited [2018] eKLR**

It is the duty of the employer to protect all employees at the shop floor. Where it relates to sexual harassment, the employer has the duty to have a workplace policy, train the employees on the same and enforce/implement it as held in the case of **J W N versus Securex Agencies (K) Limited [2018] eKLR** that;

The Court has also considered section 6(2) of the Act which imposed upon the respondent the duty, after consulting the employees or their representatives, to issue a policy statement on sexual harassment. Under section 6(3) such policy statement was to provide for definition of sexual harassment as provided for in the Act; employee entitlement to employment free from sexual harassment; steps taken to prevent sexual harassment; explain how to make or report to the employer complaints of sexual harassment; and non-disclosure of the complainant except for purposes of disciplinary process or investigating complaints.

Where a case of sexual harassment takes place, the employee is required to make out a *prima facie* case that there was sexual harassment at the work pursuant to section 47(5) of the Act and once this evidential burden is discharged the onus is on the employer to prove that there was no such conduct of sexual harassment and that there is a workplace policy which defines sexual harassment and employees are aware and can apply it to address any acts of sexual harassment against them at the workplace.

In this case, the claimant testified that on various dates she was verbally and physically sexually harassed by the 2nd respondent who is her boss and did not report since she feared losing her job and efforts to get another job was not bearing fruit. One incident when the 2nd respondent grabbed and touched her inappropriately was witnessed by a casual employee a Mr A but who refused to attend court as her witness since he is still in the employment of the respondent.

The claimant also testified that in August, 2018 she reported the matter to the labour officer, the late Mr Karanja but was advised that his office does not address cases of sexual harassment and discrimination at the workplace and should file suit.

The respondent in defence denied the allegation on the grounds that there is no sexual harassment of any employee of the respondent particularly the claimant by himself or any of her co-workers. The respondents failed to state how many employees are at the shop floor or what measures have been taken to address the issue of sexual harassment of any employee of the respondents'. The 2nd respondent maintained that no case of sexual harassment has been reported by the claimant.

The 2nd respondent as the managing director of the respondent is placed at a supervisory position of his employees. Upon the claims made by the claimant, the burden shifted to the respondents' to prove that there is no sexual harassment of any employee and especially the claimant as alleged.

In the case of **Lydiah Mongina Mokaya versus St. Leonard's Maternity Nursing Home Limited [2018] eKLR** the court in addressing similar claim as herein and relating to sexual harassment of the employee at the shop floor held that;

Cases and instances of sexual harassment are extremely personalized and difficult to prove. More often than not, these would not be documented but comprise of overt and covert overtures by the offending party. It is therefore expected that when this arises, action should be taken towards reporting or raising the same with the powers that be, the employer or his agents. Sometimes the prevailing environment may not be facilitative of this. It would therefore be unreasonable to employ the standard burden of proof on this kind of matters. This is like in the present case.

The claimant's case overwhelms that of the respondents. It is the more probable of the two cases.

The court finds there were direct and indirect acts of sexual harassment against the claimant at the shop floor instigated by the 2nd respondent. such conduct is prohibited in law and specifically under section 6 of the Act. upon proof, that there was sexual harassment at the shop floor against the claimant by the 2nd respondent, defence that there was no report to the police does not arise.

The court finds the respondents jointly and severally committed acts of commission and omission and leading to the violation of the claimant's rights at work and exposed her to sexual harassment by overt and covert acts. Such conduct is prohibited in law.

Payment of damages for sexual harassment of the claimant by the respondents is due. The claimant has relied on several cases and made a claim for payment of Ksh.5,000,000. On the evidence before court, the court finds an award of Kenya Shillings fifty thousand (Ksh.50,000) as an appropriate award.

On the case of discrimination against the claimant, the claimant's case is that she was discriminated against due to her pregnancy contrary to section 5 and 46(a) of the Act. That when she applied for maternity leave she was not allowed and was not paid her due wages thereof.

It must be noted, however, that once an allegation of unfair discrimination based on any of the listed grounds in section 46 of the Act is made, section 47(5) of the Act places the burden of proof on the employee to prove that such discrimination did occur and then the employer is required under section 43 of the Act to prove that such discrimination did not take place or that it is justified.

Where discrimination is alleged on an arbitrary ground, the burden is on the complainant, the claimant in this instance to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.

The claimant testified that in February, 2018 she informed the respondent that she was pregnant. In June, 2018 the 2nd respondent advised her to take her annual leave but opted to work and be paid instead because she needed the finances. That her month of annual leave was ordinarily July and since her delivery was due from August, she opted to work instead of taking annual leave in June, 2018. Her request was accommodated.

The court finds no case of discrimination against the claimant as alleged.

On the issue of whether there was unfair termination of employment, The claimant submitted that there was constructive dismissal from her employment by the conduct of the respondent. However such constructive dismissal was not pleaded to allow the respondent address.

Even where the claimant was to plead constructive dismissal, which is not the case here, constructive dismissal must arise from the act of the employee leaving employment by notice to the employer for being placed under intolerable work conditions. The circumstances leading to such action must be outlined.

The claimant testified that she worked until 31st July, 2018 since she did not want to take her annual leave and needed the finances. She took her maternity leave from August, 2018. She however sought advice from the labour officer and who directed her to attend hospital and seek medical leave and submit to the respondent and where such was approved she would tell employment was not terminated and where such leave was declined, then she would know her employment had been terminated.

There is no evidence of illness or sickness as required under section 30 and 34 of the Employment Act, 2007. See **Dorothy Ndung'u versus Machakos University [2015] eKLR** and in the case of **Gideon Akwera versus Board of Governors Church on the Rock Academy [2015] eKLR**, the court held that an employee who is absent from work without medical evidence is essentially of gross misconduct.

There is also no evidence of birth for the reason of taking maternity leave as required under section 29 of the Employment Act, 2007.

There is no legal reason for leaving employment. The advice by the labour officer and leading to notice and demand to the respondent dated 17th September, 2018 is not supported in any material way.

Absence from employment without good cause and or evidence of sickness, maternity or sufficient cause is gross misconduct pursuant to section 44(3) and (4)(a) of the Employment Act, 2007 and which justify summary dismissal. The claimant left employment and has not submitted a good cause and hence she frustrated her own employment and the claim for compensation and notice pay are not justified.

On the remedies sought, payment for 3 months during maternity leave on the findings above that the claimant failed to apply and obtain maternity leave or produce evidence of being delivered any child is without justification. Absence from work without good cause is subject to summary dismissal further, the claimant testified that she would send a friend and a Mr Abdul to the labour officer to get various communications therefrom, nothing stopped her from submitting her maternity leave application of birth certificate and obtain approved leave from the respondent where need arose. The inaction on the part of the claimant cannot be visited against the respondent.

On the claim for damages for violation of constitutional and statutory rights, the court only finds one element of sexual harassment and this is addressed and redressed as above.

On the claim for notice pay, there was no termination of employment at the instance of the respondents as the employer. The claimant left her own employment without good cause. Notice pay is not due.

On the claim for severance pay, such pay is only due in a redundancy and the case here does not stand out as one such case.

Compensation is only due pursuant to section 49 of the Act read together with section 45 where there is a finding that there was unfair termination of employment. The court finds no justification for such a claim the claimant having frustrated her own employment by failing to apply and obtain leave.

Accordingly, the court finds the claims made are without merit save there was sexual harassment of the claimant by the acts of

commission and omissions of the respondents jointly and severally and damages are hereby awarded at Ksh.50,000 only. Each party shall bear own costs.

Delivered in open court at Nairobi this 27th day of January, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and