



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NUMBER 956 OF 2016**

**BETWEEN**

**AKO .....CLAIMANT**

**VERSUS**

**ABSON MOTORS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*M. Mochama & Company Advocates for the Claimant Lumatete Muchai*

*& Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed her Statement of Claim, on 15<sup>th</sup> October 2016. She states, she was employed by the Respondent on 19<sup>th</sup> December 2007 as a Receptionist. Her last salary was Kshs. 34,799, monthly.
2. She was expectant, and experienced pregnancy-related sickness, and was placed on sick-off, to resume duty on 16<sup>th</sup> November 2016. She was on 21<sup>st</sup> November 2016, on resuming duty, handed a letter of termination, dated 17<sup>th</sup> November 2016. The General Manager had prior to termination implored the Claimant to resign, on the promise that she would be paid 3 months' salary. She declined, asserting her fitness and willingness to continue working.
3. The letter of termination did not disclose reason, or reasons, for the decision. She holds that termination was based on pregnancy discrimination and was unfair. She was not presented with any charges; She was not heard on any allegations; and did not have notice of termination.
4. She asks the Court to find that termination violated protections availed to her, by the Constitution of Kenya, Employment Act and her Contract of Employment, and to grant her: -
  - a) 3 months' salary in lieu of notice at Kshs. 104,397.
  - b) Service gratuity of 15 days' salary for 8 years, at Kshs. 139,2000.
  - c) 12 months' salary in compensation for unfair termination at Kshs. 417,588.
  - d) General damages for pregnancy discrimination at Kshs. 4,000,000.
  - e) November 2016 salary at Kshs. 34,799.
  - f) Loss of future earnings during pregnancy and maternity period of 8 months, at Kshs. 278,392.
  - g) Pending annual leave at Kshs. 27,840.

h) Medical Report dated 14<sup>th</sup> December 2016 at Kshs. 1,200.

i) Advocate's collection fee at Kshs. 501,961

Total... Kshs. 5,505,377

j) Pension dues under Britam.

k) Certificate of Service.

5. The Respondent filed its Statement of Response on 18<sup>th</sup> January 2017. It is conceded that the Claimant was employed by the Respondent as a Receptionist, on a starting salary of Kshs. 20,000 monthly, and Kshs. 34,799 by the time she left employment. It is denied that her contract was terminated on pregnancy discrimination. The Respondent was not aware about her pregnancy. Her contract had a clause providing for termination on 30- day notice. There was no discrimination whatsoever. Notice was paid. Annual leave days were utilized. She did not collect her Certificate of Service. She is not entitled to damages and compensation. Termination was in accordance with the law.

6. The Claimant gave evidence and closed her case, on 9<sup>th</sup> October 2019. The Respondent failed to present evidence on 3<sup>rd</sup> March 2020. Hearing closed on 3<sup>rd</sup> March 2020. An Application by the Respondent dated 19<sup>th</sup> March 2020, seeking to re-open proceedings was declined, in a Ruling dated 15<sup>th</sup> December 2020. Parties were directed to file their Closing Submissions. It was confirmed by the Court at the last mention on 19<sup>th</sup> January 2021, that Submissions have been filed. The file was forwarded from the Court in Mombasa to the undersigned Judge sitting at Nairobi, on 19<sup>th</sup> January 2021, for preparation of Judgment.

### **Claimant's Evidence**

7. The Claimant adopted her Witness Statement and Documents on record, in her evidence before the Court. She was employed by the Respondent as a Receptionist on 2<sup>nd</sup> February 2009. She was unwell in August 2016. She was upon medical examination, found to be pregnant. She was given sick off. The Respondent advised her to instead, apply for annual leave. She was given 1 month to rest, beginning 17<sup>th</sup> October 2016. She resumed duty on 16<sup>th</sup> November 2016. She worked until 21<sup>st</sup> November 2016, when the General Manager, Simon Mwaniki, called her to his office. He asked her to write a letter saying she was not fit to continue working, because of her pregnancy. He wanted her to write a letter of resignation.

8. The Claimant did not accept the proposal made by Mwaniki. He issued her the letter of termination dated 17<sup>th</sup> November 2016, on 21<sup>st</sup> November 2016. There was no notice of termination, or complaints of any nature, against the Claimant, communicated by the Respondent. She was told if she resigned, she would be paid 3 months' salary, which would come in handy, because she was pregnant. It is not true that the Respondent was unaware about her pregnancy. She did not go on annual leave. She took sick leave, which the Respondent indicated on the leave form, as annual leave.

9. She filed the following documents in support of her Claim: national identification card; contract dated 19<sup>th</sup> December 2009; letter confirming her employment dated 7<sup>th</sup> July 2012; letter of salary increment dated 30<sup>th</sup> May 2014; termination letter dated 17<sup>th</sup> November 2016; and medical records capturing her pregnancy and associated illness. It is confirmed in the Medical Report dated 14<sup>th</sup> December 2016, that the Claimant was pregnant, and suffered from *emesis gravidarum* [excessive vomiting in pregnancy], and was treated for insomnia and depression.

10. As indicated at the outset, the Respondent's Advocate did not cross-examine the Claimant, and the Respondent did not adduce evidence.

### **Submissions.**

11. **The Claimant submits** that the Respondent failed to adduce evidence. Relying on ***Linus Ng'angá Kiongo & 3 Others v. Town Council of Kikuyu [2012] e-KLR***, the Claimant submits this means, that not only is the Claim unchallenged, but also, that the Statement of Response is unsubstantiated.

12. It is submitted for the Claimant that the Respondent was bound in law, to give the Claimant reason, or reasons, for termination, as held by the ***Court of Appeal in Kenfreight [E.A.] Limited v. Benson K. Nguti [2016] e-KLR***. The Claimant was not told why her contract was terminated.

13. The Claimant adopts ***G.M.V v. Bank of Africa Kenya Limited [2013] e-KLR*** in urging the Court to find, that in any proceedings where a contravention of Section 5 of the Employment Act 2007 is alleged, the Employer shall bear the burden of proving that discrimination did not take place. The Claimant submits that the Respondent violated her right not to be discriminated against on the basis of pregnancy, enshrined in the Constitution of Kenya, the Employment Act and the African Charter on Human and Peoples' Rights

14. Lastly, the Claimant submits that in ***G.M.V v. Bank of Africa Limited***, the Court awarded general damages for pregnancy discrimination at Kshs. 3 million. She urges the Court in her Closing Submissions, to grant general damages at Kshs. 7 million – which is a departure from the general damages pleaded in the Statement of Claim, of Kshs. 4 million. She submits she is entitled to the other prayers contained in the Statement of Claim.

15. **The Respondent submits**, it was not informed by the Claimant that she was pregnant. She did not exhibit documents showing that she was ill and pregnant. Section 107 of the Evidence Act and Section 47[5] of the Employment Act, placed the burden of proof, on both claims

for pregnancy discrimination and unfair termination, on the Claimant. She did not discharge this evidential burden. She was accorded full support during her first pregnancy as shown in documents of record. It is implausible that the Respondent would discriminate against her on her second pregnancy. It is submitted that the Claimant tendered resignation on 30<sup>th</sup> April 2014. She cannot claim her contract was unfairly terminated. It is submitted that as a general rule, damages are not recoverable in cases of alleged breach of contract, as held in **Civil Appeal No. 120 of 2017, Kenya Tourist Development Corporation v. Sundowner Lodge Limited**. The Respondent submits that damages claimed for pregnancy discrimination and compensation for unfair termination, cannot be granted simultaneously. Such an award would result in duplication of remedy.

#### **The Court Finds: -**

16. There is no dispute about the Claimant's employment with the Respondent. Her employment history, terms and conditions of service, and date of termination, are not disputed. It is common evidence that termination was instigated by the Respondent.

17. Proof in employment discrimination Claims, is regulated by Section 5 [7] of the Employment Act, which reads: “ ***In any proceedings where a contravention of this section is alleged, the Employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission, is not based on any of the grounds specified in this section.***”

18. Proof in pregnancy discrimination Claims, is not governed by Section 107 of the Evidence Act, or Section 47[5] of the Employment Act 2007, as submitted by the Respondent. It is specifically governed by Section 5[7] of the Employment Act. The Court in **G.M.V. v. Bank of Africa Limited** held that all the Claimant is required to do is establish a *prima facie* case, through direct or statistical proof, that she has been discriminated against at employment, on account of her pregnancy. She must show that she has suffered adverse employment action, directly as a result of her pregnancy. It must be shown that other explanations given by the Employer, are pretextual.

19. Section 47 [5] of the Employment Act regulates proof in unfair termination / wrongful dismissal. It is for the Employee to show that unfair termination / wrongful dismissal has taken place, while the Employer must justify the grounds for unfair termination/ wrongful dismissal. Whereas the Evidence Act applies in general, to all judicial proceedings, such application is subject to other laws, governing evidence, in specialized Courts. Section 107 of the Evidence Act which requires that he who asserts, must prove the existence of the facts relied upon, does not affect Section 5[7] of the Employment Act, on proof of pregnancy discrimination. The Employee is required to establish a *prima facie* case. There is no strict standard of proof. The frequent line of defence, by Respondents, that “ *the Claimant is put to strict proof thereof*” has no meaningful value in pregnancy discrimination litigation. The law seeks to protect Claimants in pregnancy discrimination and encourage them to come out in the open, pursue remedies, and confront deviant Employers, safe in the knowledge that the law shall not demand of them, to strictly prove that they have been discriminated on the basis of pregnancy. There are moral and ethical considerations that allow the strict standards of proof in the Evidence Act, to be moderated through a less strict law of evidence in proof of pregnancy discrimination, and other discrimination, under the Employment Act 2007. The law recognizes that Claimants in pregnancy discrimination are a vulnerable group, and the law is therefore designed in a manner, that encourages Claimants to pursue remedy without fear of reprisal, with dignity, modesty, and unhindered by a choking evidentiary regime. The burden therefore shifts on the Employer, once there is a *prima facie* case, to show that discrimination did not take place, or that the acts or omissions complained of, are not based on any grounds specified under Section 5 of the Employment Act.

20. In this dispute the Respondent has not given evidence. There is quite clearly, no evidence adduced, showing that discrimination did not take place, and that discriminatory act or omission, is not based on any of the grounds specified in Section 5 of the Employment Act.

21. The evidence by the Claimant established a strong *prima facie* case of pregnancy discrimination, which without any evidence from the Respondent, stands unshaken. The Respondent did not even test the Claimant's case through cross-examination.

22. The case is founded on the following documents: medical records showing that the Claimant was pregnant, which include ante-natal and present pregnancy profile cards; medical records showing she was on sick off on various dates including 19<sup>th</sup> September 2016 and 17<sup>th</sup> October 2016; and leave request forms executed by the Claimant and the Respondent, dated 23<sup>rd</sup> September 2016 and 11<sup>th</sup> October 2016.

23. The Claimant's case is also based on unchallenged oral evidence. She testified she was advised to apply for leave by the Respondent, rather than extend her sick off during pregnancy. She went on leave. Upon return she was told by the General Manager to resign. She was told she would be paid 3 months' salary if she agreed to quit, which sum would come in handy, during her pregnancy problems. It was not specified what 3 months' salary constituted. The General Manager was portrayed in the evidence of the Claimant, as having been desperate to see the Claimant out of the workplace. She declined, and termination letter dated 17<sup>th</sup> November 2016 followed. The letter itself does not state any clear reason justifying termination. She was simply informed that her services would no longer be required. It can only be concluded that this general allusion, about services no longer being required, was pretextual. The underlying reason was that the Claimant was pregnant, and persistently unwell, and in the eyes of the Respondent unproductive at work, and therefore dispensable.

24. The inference would be that the Respondent had become weary of the Claimant's constant pregnancy- induced absence from work. She had gone on sick off and Respondent's imposed annual leave. But her vomiting, insomnia and depression had no end. She had not even taken her statutory 3- month maternity leave yet. The Respondent perceived her as a big burden in its business, and resorted to termination, brusquely advising the Claimant that her services were no longer required.

25. The Respondent was aware that the Claimant was expectant and experiencing pregnancy related illness. The sick off sheets issued by The Mombasa Hospital were for the Respondent's consumption. The imposed leave was suggested by the Respondent, in response to Claimant's incessant pregnancy-related absence from duty. There can be no doubt that the Respondent knew, that the Claimant was pregnant.

26. The resignation letter of 30<sup>th</sup> April 2014 alluded to in the Submissions of the Respondent, is irrelevant to the proceedings herein. Termination by the Respondent was in 2016, which would mean that even if the Claimant had resigned in 2014, she was recalled in between 2014 and 2016. The Respondent filed documents which show the Claimant in attendance, after 2014. It is incorrect to submit that because the

Claimant resigned in 2014, her Claim relating to 2016 is without merit.

27. Beyond pregnancy discrimination, the Respondent clearly did not adhere to minimum statutory standards of fairness, in terminating the Claimant's contract. That is to say, that even had the Claimant not been pregnant, and was told simply that her services were no longer required, termination would still have been legally infirm. She was not taken through a disciplinary hearing. She was not faced with any performance-related complaints. The Respondent states in the letter of termination, that her services were no longer required. It was not shown that her position had become superfluous. There was no evidence of termination based on operational requirement. The Respondent did not have valid reason, justifying termination. Termination was abrupt, without reason or notice. The Claimant discharged her burden of proof on unfair termination, under Section 45[7] of the Employment Act. The Respondent did not justify termination.

28. The Claimant merits damages for pregnancy discrimination, which is not the same thing as compensation for unfair termination. As suggested in **G.M.V v. Bank of Africa Limited**, pregnancy discrimination implicates violation of multiple fundamental rights under the Constitution, including: the right to have equal opportunity in economic and social sphere; right of fair labour practices; right of inherent dignity; and right to have a family. The Court is not limited to compensating the Claimant, equivalent of her 12 months' salary, in a Claim that comprises pregnancy discrimination and unfair termination. Comparative decisions on discrimination, buttress this position. The Human Rights Tribunal of Ontario in Canada, in **Arunachalam v. Best Buy Canada Limited, 2010 HRTO, 1880** held, that the remedy of damages in discrimination claims, recognises that victims of discrimination, suffer more than just quantifiable losses such as lost wages. The victims suffer being treated with less dignity. Compensation focuses on personal loss: physical, psychological and pecuniary. To these types of loss, must be added intangible interests. The Ontario Tribunal concluded that a Claimant, whose intangible interests are harmed, cannot be precluded from recovering damages, simply because she cannot prove substantial psychological injury.

29. The Claimant was actively subscribed to the N.S.S.F. Her prayer for service pay, is not supported by the law or by her contract and is declined.

30. There is no factual or legal basis, for payment of damages for loss of future earnings.

31. The prayer for Advocate's collection fees, at Kshs. 501,961 is way out of tune with the Advocates Remuneration Order, and borders on the extortionate. It is declined.

32. The Claimant would have been entitled to maternity leave. She does not however, merit compensation for the untaken maternity leave. Maternity rights under Section 29 [4] of the Employment Act, are granted where the Employee has issued not less than 7-day notice, or a shorter period as may be reasonable in the circumstances, to the Employer. Maternity rights had not accrued at the time the Claimant left employment, for her to claim any compensation for unutilized maternity leave. She had not issued any notice of proposed maternity leave. She was allowed annual leave of 30 days, which she states was essentially sick leave, which the Respondent translated to annual leave. She had earlier on, on 23<sup>rd</sup> September 2016, taken leave of 12.5 days, and on 11<sup>th</sup> October 2016 taken leave of 4.5 days. She was granted sick off leave of 30 days on 17<sup>th</sup> October 2016. The Court does not think sick leave should have been translated to annual leave. The two are distinctive forms of leave, regulated under Sections 28 and 30 of the Employment Act respectively. The Claimant would be entitled to annual leave, but has not given details of this prayer, to enable the Court make an informed award. She simply pleads *'payment in lieu of annual leaves of 21 days at Kshs. 1,160 x 24 days.* ' This prayer is unclear and is declined.

33. The Claimant has shown that she paid Kshs. 1,200 to The Mombasa Hospital, for the medical report dated 14<sup>th</sup> December 2014. **The prayer for Kshs. 1,200 is allowed.**

34. She prays for 3 months' salary in lieu of notice. Her letter of employment, dated 19<sup>th</sup> December 2007 provided for 1-month notice, or the equivalent salary in lieu of notice. Her letter dated 7<sup>th</sup> July 2012 confirmed the Claimant in employment, and advised her that other terms and conditions of employment remained the same. The last variation of contract on record is the internal memo dated 30<sup>th</sup> May 2014. The Claimant's salary was improved from Kshs. 22,278 monthly, to Kshs. 34,799. The memo states that, other terms and conditions of employment remained the same, as per the appointment letter. The Court has not seen any document, varying notice to 3 months, or 3 months' salary in lieu of notice. **The Claimant is granted 1-month salary in lieu of notice, at Kshs. 34,799.**

35. Termination letter indicates effective date of termination, was 17<sup>th</sup> November 2016. The Claimant is entitled to salary for 17 days in employment in the month of November 2016, not the full salary for November 2016 as claimed. **She is granted salary for 17 days worked in November 2016, at Kshs. 22, 753.**

36. **It is declared that termination of the Claimant's contract violated Claimant's right not to be discriminated against on account of her pregnancy, under the Constitution and the Employment Act, and was unfair.**

37. The Court granted coalesced general damages in the case of **G.M.V v. Bank of Africa Limited**, which has been cited by both Parties, at Kshs. 3 million. It was taken into account that termination was unfair for lack of substantive reason and procedural fairness. It was taken into account that termination was based on pregnancy discrimination, and that the Claimant did not have adequate redress in the maximum of 12 months' salary, given under the Employment Act. The Court therefore allowed coalesced damages at Kshs. 3 million, redressing both pregnancy discrimination, and unfair termination. A separate prayer for 12 months' salary in compensation for unfair termination, at Kshs. 2.1 million, was rejected. Although damages for pregnancy discrimination and compensation for unfair termination do not redress the same injury, there is no bar in merging the remedy, and granting coalesced damages, because the wrongs sought to be redressed, are based on similar facts. The Court must be guided by the need to adequately compensate both wrongs, while discouraging multiplication or remedies, arising from the same set of facts. In CA decision, **Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR**, the Court held that employment remedies ought to be proportionate to the injury sought to be redressed, and always aimed at the achievement of a fair-go-all round.

38. The Claimant submits that she merits damages at Kshs. 7 million. She pleads the same item at Kshs. 4 million, in her Statement of Claim.

She was a Receptionist, earning a monthly salary of Kshs. 34,799. **G.M.V** was an Elite Bank Manager, earning a monthly salary of Kshs. 160,000. Although the Claimant lost her job, like **G.M.V** on account of pregnancy discrimination, after she experienced pregnancy-related illness, the two Ladies cannot be said to have had the same stock in the labour market, or the same academic and professional credentials. They were in different industries, performing different roles. There is no persuasion for grant of damages at Kshs. 3 million, Kshs 4 million or Kshs. 7 million. **The Court grants coalesced damages to the Claimant, at Kshs. 1, 417, 588.**

39. No evidence was adduced, relating to Britam Pension dues, and the Administrator of that Scheme, is not a party to, or witness in, this Claim. The Court is not able to grant any order in favour of the Claimant, with regard to pension dues.

40. **Certificate of Service to issue.**

41. **Costs to the Claimant.**

42. **No order on interest.**

**IN SUM IT IS ORDERED: -**

**a. It is declared that termination of the Claimant's contract violated her right not to be discriminated against on account of her pregnancy, under the Constitution and the Employment Act 2007, and was unfair.**

**b. The Respondent shall pay to the Claimant: cost of medical report at Kshs. 1,200; notice at Kshs. 34,799; 17 days' salary for November 2016 at Kshs. 22,753; and coalesced damages at Kshs. 1,417,588 – total Kshs. 1,476,340.**

**c. Certificate of Service to issue.**

**d. Costs to the Claimant.**

**e. No order on interest.**

**Dated, signed and released to the Parties electronically at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 19<sup>th</sup> day of February, 2021.**

**James Rika**

**Judge**