



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 343 OF 2017

MILDRED AMAGOVE.....CLAIMANT

VERSUS

ULTIMATE MANPOWER & GENERAL

SUPPLIES LTD.....RESPONDENT

JUDGMENT

1. This claim arises from an alleged termination of a contract of employment between the Respondent and the Claimant. It is premised on the Memorandum of Claim filed on 20th February 2017. Though served with the Statement of Claim, the Respondent did not enter appearance or file a reply to it. Consequently, the cause proceeded as undefended.

2. In her pleadings, the Claimant asserts that she was employed by the Respondent around May 2013 as a general worker. She states that her starting salary was Ksh. 12,000/=. That amongst other duties, she used to work as a stock and shift controller.

3. The Claimant further asserts that she proceeded on maternity leave around the close of August 2016. She asserts that as she resumed duty around 29th November 2016 she was terminated by the Respondent. She further asserts that her termination was without valid cause. And neither was she issued with a notice of the termination. It is her further contention that in so far as the termination was done without adherence to the requirements of respect for the right to due process, it offended the protections afforded employees against unfair termination under the Employment Act.

4. In the Claimant's considered view, her termination was triggered by her pregnancy and connected conditions. It was therefore in violation of her right not to be subjected to discriminatory treatment as provided for under article 27 of the Constitution of Kenya 2010 as read with section 5 of the Employment Act, 2007.

5. The Claimant further contended that she was unfairly treated by the Respondent when the Respondent allegedly failed to pay her full salary during her maternity leave. Against her full salary of Ksh. 18,000/=: the Claimant asserts that the Respondent allegedly only paid her Ksh. 9,000/= and Ksh. 8,500/= during her 1st and 2nd months of maternity leave. Salary for the last month was allegedly not paid.

6. It is against this background that the Claimant prays for judgment against the Respondent for the following:-

- a. 12 months' salary as compensation for unfair termination;
- b. 1 month pay in lieu of notice;
- c. Ksh. 18,000/= as service pay for the period between 2014 and 2015;
- d. General damages of Ksh. 500,000/= for the discrimination allegedly visited upon her contrary to the Constitution and law;
- e. Unpaid maternity leave quantified at Ksh. 36,500/=:
- f. Costs of the suit;
- g. Any other relief the court may deem fit to grant.

7. On 10th August 2021, the Claimant testified in support of her claim. Her evidence was basically a reiteration of what is set out in her pleadings and her witness statement as filed. She adopted the witness statement dated 20th February 2017 as her evidence in chief. As well, she adopted the documents attached to her list of documents as exhibits 1 and 2 in support of her case.

8. Exhibit 1 is a recommendation by the Respondent for the Claimant. The document confirms that the Claimant worked for the Respondent between May 2013 and December 2016. It also supports the Claimant's assertions that she was employed as a general worker to, among other duties, undertake tasks such as stock and shift control.

9. Significantly, exhibit 1 also confirms the fact that the Claimant's employment terminated around December 2016. However, the document does not disclose the reasons for the termination of the Claimant's employment.

10. Exhibit 1 further describes the Claimant character while in the service of the Respondent. She is described as "a trustworthy employee" who performed her duties diligently, honestly and with integrity. In the Respondent's view (if the recommendation is anything to go by), the Claimant fitted the description of a good employee who needed very little supervision in the discharge of her tasks. It is therefore surprising that the Respondent unceremoniously terminated such employee without providing the reasons for this decision.

11. That the Claimant was expectant around September 2016 is established by the notification of birth document number 0196971 produced as Claimant's exhibit 2. The document shows that the Claimant delivered on 9th September 2016 at Hope Medical Clinic. This document supports the Claimant's assertion that she proceeded on maternity leave around August 2016.

12. Section 29 of the Employment Act entitles a female employee to maternity leave of not less than 3 months with full pay once she gets a pregnancy and delivers. The right starts at any time before delivery and runs into the post delivery period. It is intended to provide the mother to a newborn the opportunity to nurture the child. This right was therefore available to the Claimant.

13. If the Claimant delivered around 9th September 2016, then her leave under section 29 of the Employment Act ran from late August 2016/early September 2016 to the close of November 2016 or thereabouts. Over this period, the Claimant was also entitled to full pay. Further and as the law provides, upon the lapse of the leave, the Claimant was entitled to resume her duties either in her previous position or in a position that was substantially similar to her previous position.

14. The Claimant testified that on 29th November 2016 when she resumed duty, her services were promptly terminated. The court finds that such action by the Respondent was in violation of the stipulations of section 29 of the Employment Act aforesaid.

15. It is further apparent from the evidence tendered that the Respondent did not issue the Claimant with a notice to terminate the contract of service as is required under section 35 of the Employment Act. And neither is there evidence that there was a specific valid reason given by the Respondent to terminate the Claimant as is required under section 41 of the Employment Act as read with section 45 thereof. Similarly, there is no evidence of due process having been observed by the Respondent in the journey towards rendering the decision to terminate the Claimant.

16. The Claimant asserts that the only reasons she was terminated were her pregnancy and the subsequent maternity leave that she took. In the absence of evidence to the contrary and having regard to the Respondent's comments about the Claimant's exemplary performance at work as contained in exhibit 1, the court finds that the only plausible explanation for the Respondent's behavior against the Claimant must have been due to the pregnancy and maternity leave taken by the Claimant. This is especially so when viewed from the viewpoint that the impugned termination happened immediately after the Claimant resumed her duties. Thus, the court finds that the termination offended the bar set by section 46 of the Employment Act.

17. Further, as the termination related to the Claimant's pregnancy, it certainly offended the dictates of article 27 of the Constitution as read with section 5 of the Employment Act. By sacking the Claimant on account of matters related to her pregnancy, the Respondent treated the Claimant differentially at the workplace on account of this condition. And this is expressly forbidden by law.

18. Accordingly, it is the court's finding in concurrence with the submissions by counsel for the Claimant that the Claimant was unlawfully terminated and in a manner that violated her right to be protected from discrimination at her work place.

19. The next issue for determination is whether the Claimant is entitled to any remedy under the law. If the answer to this question is in the affirmative, the correlated issue will be what remedies are to be granted to the Claimant?

20. The Claimant has claimed Ksh 500,000/= to cover general damages for violation of her right not to be discriminated against on account of pregnancy. In addition, she prays for compensation equivalent to gross salary for the aggregated period of twelve months under section 49 of the Employment Act.

21. It is now settled that the court can award a deserving Claimant general damages outside the twelve months capping under section 49 of the Employment Act. However, this must only be under exceptional circumstances. One such instance is where a Claimant seeks compensation for violation of a constitutional right as a result of some commission or omission under a contract of service. In such case, the court may award general damages in reparation of the violated right in addition to any other compensation contemplated under section 49 of the Employment Act. This approach is seen in a number of decisions by this court including ***Claudine Wanjiku Mboce v Exxon Investments Limited & another [2017] eKLR***.

22. However, caution must be exercised in the circumstances not to burden the Respondent with multiple awards for transgressions arising from ostensibly the same set of facts. Similarly, the court should as a general guide, avoid granting constitutional remedies where the Claimant's grievance can be adequately compensated by remedies under an Act of Parliament. These principles are underscored in ***G M V v***

23. Having regard to the foregoing guidelines, the court is inclined to award the Claimant a consolidated award in lieu of standalone awards for violation of the right against discrimination and to cover compensation for wrongful termination under the twelve months capping. However, other items shall be considered distinctly.

24. In respect of the claim for general damages for violation of the Claimant's right against discrimination and the prayer for damages equivalent to twelve months salary, the court will award a global amount of Ksh 550,000/=.

25. The evidence on record shows that the Claimant was terminated without notice. As an employee drawing monthly salary, the minimum period of notice the Claimant was entitled to under section 35 of the Employment Act is twenty eight (28) days. Alternately, the Respondent ought to have paid the Claimant salary in lieu of notice but equivalent to the notice period. Consequently, the court awards the Claimant Ksh 18,000/= being salary in lieu of one month notice.

26. The Claimant has also claimed service pay for the years 2014 and 2015. The evidence availed shows that the Claimant was employed by the Respondent in May 2013 and was terminated in November 2016. Under section 35(5) of the Employment Act, an employee whose contract of service is terminable by giving of a minimum of 28 days' notice is entitled to service pay for every year worked if such employee is not already a member of some other scheme under which some other gratuity is payable. However, the terms of this entitlement are not fixed by the Act.

27. To overcome this challenge, the court has evolved a practice of borrowing the formula applied to compute severance pay under section 40 of the Act to fix the quantum of service pay under section 35(5) of the Act. The court will therefore award the Claimant service pay equivalent to 15 days for every year worked. This should work out to Ksh 18,000 x ½ x 3 = Ksh 27,000/=. However, as the Claimant has prayed for Ksh 18,000/= under this head, the court will award Ksh. 18,000/=.

28. The Claimant has also claimed Ksh 36,500/= as unpaid maternity leave. This is in the form of salary withheld during the Claimant's maternity leave. Her testimony was that the Respondent paid her Ksh. 8,500/= during the first month of her maternity leave and Ksh. 9,000/= during her second month of the leave. She was not paid salary during her final month of maternity leave.

29. This evidence was not controverted by the Respondent. In the premises, I award the Claimant this withheld salary for the period in question at Ksh. 35,500/=.

30. The Claimant is also awarded interest on the awards above plus costs of the claim.

31. The awarded amounts shall be subject to statutory the applicable statutory deductions where appropriate.

32. Summary of the award:-

a. Compensation for violation of the right against discrimination and for unlawful termination Ksh. 550,000/=.

b. Service pay Ksh. 18,000/=.

c. Pay in lieu of notice Ksh 18,000/=.

d. Withheld salary (leave pay) Ksh. 35,500/=.

TOTAL Ksh. 621,500/=.

e. Interest at court rates on a), b), and c) above.

f. The award is subject to the applicable statutory deductions.

g. Costs to Claimant.

DATED, SIGNED AND DELIVERED ON THE 10TH DAY OF SEPTEMBER 2021

B O M MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE