



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 963 OF 2017

CAROLINE NYOKABI MWANGI.....CLAIMANT

VERSUS

ACHELLIS KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The instant matter was instituted by way of a statement of claim dated 19th May, 2017 wherein the claimant has alleged that she was unlawfully terminated on account of her pregnancy. She prayed for the following orders;

- a) **A declaration that the claimant's termination was unfair, wrongful and consequently unlawful/illegal.**
- b) **A declaration that the claimant was discriminated against based on her sex and pregnancy in violation of section 5(3), section 46(a) and 46(g) of the Employment Act, 2007 and Article 27(5) and Article 41(1) of the Constitution.**
- c) **A declaration that the claimant was discriminated against based on her sex and pregnancy in violation of the International Labour Organization (ILO) Convention 183 of 2000 on employment and non-discrimination.**
- d) **General damages for discrimination on the basis of pregnancy and sex at Kshs 5,000,000/=.**
- e) **Three months salary totaling Kshs 330,000/= being pay which was to be earned during maternity leave.**
- f) **Leave pay for 6 days being Kshs 25,385/=.**
- g) **Pay in lieu of notice for 7 days being Kshs 29,884.61.**
- h) **Twelve months salary in compensation for unlawful termination.**
- i) **Costs of the suit.**
- j) **Interest on the principle sum to be awarded and on costs at the rate of 14% from the date of filing of this suit until payment in full.**

2. The claim was defended through a Response dated 5th July, 2017 through which the respondent stated that the claimant was rightfully terminated as she was on probation at the material time.

3. The undisputed facts of the case are that, the claimant was employed by the respondent as a Human Resources Administrator with effect from 2nd November, 2015 and placed on probationary appointment. Her starting gross salary was Kshs 110,000/= which upon completion of probation, was to be reviewed upwards to Kshs 120,000/=. The employment relationship was short lived as the claimant was terminated 5 months into her employment contract, and 5 days before the end of her probation period.

4. The matter proceeded for hearing on 28th July, 2021 with the claimant testifying as CW1. She also called one witness by the name Cornel Odhiambo. On its part, the respondent called one witness, its Human Resource Manager, Ms. Beth Mutea.

Claimant's case

5. The claimant relied on her statement of claim, witness statement and list of documents and prayed that the court adopts the same as part of her evidence in chief. She told court that upon her appointment, she served the respondent diligently and competently. She further stated that

she was pregnant at the time she joined the respondent company, a fact she disclosed one week into her employment. That she disclosed as much, in the requisite forms for purposes of a medical cover. She further stated that as her Expected Date of Delivery (EDD) neared, she put in place arrangements for handing over and started clearing her desk in readiness for her maternity leave.

6. These arrangements entailed preparing a contract for the officer who was to replace her during the 3 months she was to be away on maternity leave. She also undertook training and induction of the said replacement.

7. She avers that since the contract period for her replacement was for a period of 3 months, it was her expectation that she would report back to work at the end of the maternity leave period. On the night of 24th April, 2016, she underwent an emergency caesarean section and delivered a bouncing baby boy hence could not report to work on 25th April, 2016 as she had earlier planned.

8. Subsequently on 26th April, 2016, she called the secretary of the respondent company and informed her of the new development. On 29th April, 2016, while recuperating in hospital, she received a telephone call by a rider who introduced himself as Ezekiel. The said rider informed her that he had a very urgent package for her. It turned out that the package was a letter terminating her employment. It was her testimony that prior to her termination, there had never been any indication that the respondent was not satisfied with her work.

9. The termination letter was dated 25th April, 2016, which coincidentally, is the date she delivered her baby. She averred that the termination was occasioned by her pregnancy hence cites discrimination on the said account. She contended that her termination was therefore unfair, wrongful hence unlawful.

10. The claimant further averred that she cleared with the respondent on or around 8th July, 2016 but her dues constituting salary in lieu of notice and leave pay were yet to be paid. She later abandoned this claim, acknowledging that her dues were paid upon institution of this suit.

11. The second claimant's witness CW2, Mr. Cornell testified that he was a former colleague of the claimant and that though he did not work directly with her in the same department, he knew her to be a competent worker given that she was the go-to person in matters relating to human resource which cut across all departments and affected all employees in the respondent company.

12. CW2 further stated that sometimes in June, 2016, after the claimant's termination, another employee who was an ICT officer at the time, went on maternity leave but never returned and thereafter, word went round the respondent company, that she had been terminated while on maternity leave. In cross examination, he admitted that he could not substantiate the claim as he was not privy to the employment relationship between the parties.

Respondent's case

13. The respondent contended that the claimant was terminated while on probation and that she was issued with a 7 days' notice/ pay in lieu of notice as stipulated in her contract and the Employment Act. That the claimant was advised to collect her dues subject to clearance with the respondent but she failed to do so.

14. Ms. Beth Mutea who testified on behalf of the respondent stated that the claimant was terminated during her period of probation based on her overall performance which was poor. That it was not true that the claimant was discriminated against on account of her pregnancy.

15. Ms. Mutea added that during probation, the claimant proved not to be suitable for the position she was holding and as such, could not be confirmed. She further averred that she was pregnant at the time she rendered her testimony before court and that she has never faced any form of discrimination from the respondent on that account. In cross examination, Ms. Mutea stated that she was not in the employment of the respondent hence was relying on the record in regards to the claimant's case. She also sought to rely on the respondent's memorandum of response, her witness statement and the respondent's list of documents as part of her evidence in chief.

Submissions

16. Both parties filed written submissions with the claimant reiterating the averments of her statement of claim and testimony before court. She contended that the respondent's witness Ms. Mutea was not well versed with the facts leading up to her termination hence was not a reliable witness. She further relied on the case **Ako vs Abson Motors limited (2021) eKLR** on the standard of proof required in a pregnancy discrimination dispute. It was her submission that the burden of disproving the discrimination on account of the pregnancy fell on the respondent once a claimant alleges discrimination.

17. The claimant further relied on sections 5(6), 46 (a) and 46 (g) of the Employment Act, Article 41 (1) of the Constitution and Article 8 (1) and 8(2) of the ILO Convention 183 on maternity protection. She further buttressed her submissions on several authorities including **Janine Buss vs Gems Cambridge International School ltd (2016) eKLR**, **Michael Madara Ogot vs Maseno University (2017) eKLR**, **Yvonne Achitsa Oderere vs Maseno University (2017) eKLR** and **Judy Wacera Njau vs Belladona Pharmacy Ltd (2019) eKLR**. The claimant further submitted that her dismissal on account of her pregnancy amounted to unfair labour practice on the part of the respondent.

18. It was also the claimant's submissions that the respondent had not tendered evidence to demonstrate poor performance on her part during the probation period.

19. On its part, the respondent submitted that the claimant was still on probation hence her termination was not subject to the provisions of section 41 of the Employment Act and as such, was not required to notify and accord her a hearing prior to termination. It sought reliance on the case of **Monica Munira Kibuchi & 6 others vs Mount Kenya University ELRC Petition No. 94 of 2016** and **John Mathiu vs Mastermind Tobacco (k) ltd (2018) eKLR**.

20. The respondent further submitted that it was not bound to prove reasons for the termination of the claimant as stipulated under sections 43 and 45 of the Employment Act. To support this argument, it cited the case of **Danish Jalango vs Amicabre Travel Services (2014) eKLR**. The respondent further submitted that the claimant had not satisfied the threshold required to demonstrate pregnancy discrimination as set out in the case of **GMV vs Bank of Africa limited (2013) eKLR**.

Analysis and determination

21. From the pleadings on record, the testimonies before court and the rival submissions by both parties, the issues falling for the Court's determination are;

- a) Whether the termination of the claimant during probation was unfair?
- b) Whether the claimant was discriminated on account of her pregnancy?
- c) Whether the claimant was subjected to unfair labour practices?
- d) What remedies if any, are available to the Claimant?

Whether the termination of the claimant during probation was unfair?

22. It was not in dispute that the claimant was terminated during her probation. The respondent contended that the claimant's termination was pursuant to the provisions of section 42(1) of the Employment Act which ousts the provisions of section 41 in respect of notification and hearing prior to termination.

23. Section 42 (1) of the Act is in the following terms;

“The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.”

24. On the other hand, section 41(1) provides as follows;

“Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

25. The respondent buttressed its submissions on the case of **Monica Munira Kibuchi & 6 others vs Mount Kenya University (2021) eKLR**, and referred the court to paragraph 60 in which the Learned Judges rendered themselves as follows **“Having so found, the next question is whether the Respondent is liable for terminating the services of the Petitioners, without according them a hearing as stipulated under Section 41 of the Act. The answer to this question would be in the negative. The Respondent honestly believed and applied the law as it was prior to the pronouncements contained in this judgment. It would therefore be unjust to condemn the Respondent for applying the Law as enacted by Parliament even if that Law is, as we have found it to be, inconsistent with the Constitution.”**

26. With all due respect, this passage cannot aid the respondent's case, firstly, because the court was merely expressing itself as regards the liability of the respondent in the matter. Secondly, and as a matter of fact, the court impugned section 42(1) of the Employment Act by declaring it unconstitutional hence the court's pronouncement must be read in that context.

27. In the said case, the learned Judges entered the following final determination;

“To the extent that Section 42(1) of the Employment Act, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with articles 24, 41 and 47 of the Constitution.”

28. In arriving at this determination, the Court considered that there was no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in section 41 of the Employment Act.

29. Similarly, in the case of **Evans Kiage Onchwari vs Ambassadeur Nairobi, Nairobi Cause No 1886 of 2014** the court opined that the provisions of Section 42(1) of the Act would be unconstitutional for the reason that where an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected.

30. I hold a similar view to the one espoused in the foregoing precedents. I also note that the provisions of section 42(1) predate the Constitution (2010) and specifically Article 41(1) of the Constitution which guarantees fair labour practices to all persons and Article 27(1) which guarantees equality, right to equal protection and equal benefit before the law. Consequently, and to avoid injustice, it is imperative that section 42(1) be interpreted in light of the provisions of Articles 41(1) and 27(1) of the Constitution.

31. The respondent further submitted that the claimant was not entitled to be given reasons for the termination on account that she was an employee on probation. To support this argument, it relied on the case of **Danish Jalango vs Amicabre Travel Services (2014) eKLR**.

32. It is noteworthy that the letter terminating the claimant's employment did not provide any reasons for the termination. It reads as follows;

“Your probation with us at Achelis Kenya Limited is due to end on 2nd May, 2016. We confirm that we have decided not to continue your employment beyond your probationary period. As a result, your employment will end on 2nd May, 2016. We shall pay you 7 days wages in lieu of notice. You are also required to follow the exit clearance procedure using the clearance checklist and submit the completed form to Finance Director. Your final dues shall be paid upon clearance. We wish you the best in your future endeavours. Yours sincerely, Achelis Kenya Ltd. Signed.”

33. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination and failure to do so, such termination is deemed to be unfair. On the other hand, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that such reason is fair and valid.

34. It is notable that there is no express provision in the Employment Act that ousts the provisions of section 43(1) and 45(2) in respect of employees serving under probation.

35. In the case of **Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd [2014] eKLR**, the court held that an employment relationship exists between an employer and an employee during the probation period and as such, there are legal obligations in terms of rights and duties on the side of each party, that is to say, duties of the employer (Respondent) and rights of employee (Claimant) and vice versa.

36. The Court further found that **“fundamental rights of employees not to be unfairly terminated and the Claimant in this case, as provided for in Section 45(1) and (2) of the Employment Act cannot be abrogated during the probation period unless clearly expressed so.”**

37. The court further found that the security of tenure given to ordinary employees by section 45 of the Employment Act is still applicable to employees on probation. Thus, the employees on probation have the right not to be unfairly terminated and an employer is obliged to prove that the reasons are valid and fair.

38. I completely agree with the findings of the learned Judge. Taking into account the foregoing pronouncements by court, the relevant legal provisions vis a vis the circumstances of this case, I will arrive at a similar conclusion and find that the respondent was still bound by law to provide reasons for the termination of the claimant and since it failed to do so, the claimant's termination was unfair. I now turn to the next issue for determination.

Whether the claimant was discriminated on account of her pregnancy?

39. The claimant asserts that her termination was actuated by her pregnancy and her impending maternity leave. She terms this act on the part of the respondent as discriminatory, unlawful and fair. On the other hand, the respondent contends that the termination was on account of the claimant's poor performance during probation.

40. From the record before Court, the claimant was terminated on the same day she delivered her baby. Essentially, this was the commencement of her maternity leave. She testified before Court that she worked upto Friday, 22nd April, 2016 and in fact, intended to report to work on Monday, 25th April, 2016, were it not for the fact that she delivered her baby via an emergency caesarean section at night on Sunday, 24th April, 2016. Her evidence to this effect was not contested by the respondent either through oral or documentary evidence.

41. The claimant averred that she enjoyed cordial relations with the respondent and hence was very certain that even beyond her maternity leave, she would continue working for the respondent. She averred that she was even assigned sensitive projects which would normally not be assigned to employees who were not in good standing with the management of the respondent. What further bolstered her confidence, was the fact that she even trained her replacement by the name Winnie Mukami and event went ahead to prepare a 3-month contract for her. There was therefore all indication that her employment with the respondent was intact and secure.

42. The respondent contends that the claimant had displayed poor performance during her probation hence the reason for her termination. However, this fact was never mentioned in the termination letter nor was any evidence tendered before court to confirm the claimant's poor performance. In the case of *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010* the court observed that;

“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.”

43. It was therefore expected that the respondent would have taken measures to address claimant's poor performance if at all. Further, the fact of the claimant's poor performance if it indeed existed, could have been demonstrable by way of appraisal review, reports or such other correspondence. Besides, the respondent retained the claimant till the date when she was to commence her maternity leave. It would therefore seem that the claimant was competent in her job save for the pregnancy which became a hitch in the employment relationship.

44. From the foregoing state of affairs, it can be inferred that the claimant's imminent maternity leave triggered her termination. The argument as regards her performance is just a façade and an afterthought by the respondent.

45. Section 5(3) of the Employment Act prohibits discrimination in employment on grounds of, *inter alia*, race, colour, sex, language, religion, political or other opinion, nationality, disability, pregnancy, marital status and in respect of recruitment, training, promotion, terms

and conditions of employment, termination of employment and other matters. By dint of **section 5(6)**, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that section.

46. Further on in the Act under **Section 46(a)**, it is deemed as an outright unfair decision to terminate a female employee on the basis of her pregnancy, or any reason connected with her pregnancy.

47. In the case of **GMV vs Bank of Africa**, the court held that;

“[68]. The Court must make it clear that there is absolutely no requirement for ladies who claim to have been discriminated against by their employers on the ground of pregnancy, to strictly prove that they were indeed, discriminated against on such ground. The starting point is Section 5(6) of the Employment Act 2007.....This law places the burden of proof on the employer, not the employee. This position has adequate support in Section 43 of the Act, which requires the employer to prove the reason for termination...”

48. The court in the GMV case went ahead to state that **“All the ladies are required to do, is establish a *prima facie* case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to:-**

- **Establish she belongs to a protected class;**
- **Demonstrate she qualified for the job she lost;**
- **Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide *prima facie* proof, that other explanations by the employer are *pretextual*, and the real reason for termination was the pregnancy;**
- **Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy...”**

49. The respondent has contested that the claimant’s assertion did not pass the criteria set out in the GMV case. It is therefore necessary to unbundle the 4 conditions as set, and subject the same to the claimant’s case.

(i) Has the claimant established that she belonged to a protected class?

50. It is an undisputed fact that the claimant was pregnant at the time when she joined the respondent’s employment. Being pregnant places a woman in a protected class hence the reason for the existence of constitutional and statutory safeguards against discrimination on account of pregnancy. A clear example is Article 27(4) of the Constitution, sections 5(3) & 46 (a) of the Employment Act, and the ILO Maternity Protection Convention Number 183 of 2000. The upshot of the foregoing is that the claimant belonged to a protected class.

(ii) Has the claimant demonstrate that she qualified for the job she lost?

51. It was the claimant’s testimony that she served the respondent with diligence and competence. Her employment as a Human Resources Administrator of the respondent was subject to a competitive recruitment process as can be discerned from her letter of appointment. There was no evidence tendered by the respondent regarding poor performance on the part of the claimant. Indeed, the termination letter did not make any mention of the same. Therefore, her qualification and competence were never called into question during her employment with the respondent. In any event she would not have been employed had she not been qualified for the position.

(iii) Has the claimant showed she suffered adverse employment action, directly as a result of her pregnancy?

52. As stated herein, the claimant was terminated on the same date she gave birth and which date effectively marked the commencement of her maternity leave. The timing of the termination is very questionable. The respondent had the right to terminate the claimant’s employment any time before the expiry of the 6-month statutory period in the event it was not satisfied with her performance. The respondent was unable to discharge the burden that the termination was not as a result of the claimant’s pregnancy. All evidence points to the issue of the pregnancy and maternity leave. The respondent has not advanced a plausible reason to justify the claimant’s termination hence it can only be inferred that her termination was a direct result of her pregnancy. It would therefore seem that the respondent’s reason as regards the claimant’s performance was pretextual and the real reason for her termination was her pregnancy and her maternity leave which had just commenced.

(iv) Has the claimant established that there is a nexus between the adverse employment decision, and her pregnancy?

53. This issue is tied to the previous one. As I have stated above, the timing of the claimant’s termination was highly questionable as it came exactly on the same date the claimant was commencing her maternity leave. No reason was advanced by the respondent to indicate that the termination was as a result of some other issue. It is therefore apparent that the claimant’s termination and her pregnancy are directly linked.

54. From the foregoing analysis, I would find that the claimant’s assertion that she was discriminated on account of her pregnancy, has met the criteria set out in the GMV case. The claimant was only required to establish a *prima facie* case and I find she has done so.

55. On its part, the respondent had the burden to demonstrate and prove that the reasons for the claimant’s termination were non-discriminatory. This it has failed to do. In as much as the respondent cited the claimant’s poor performance at work, it did not tender

evidence in whatever nature and form to prove as much. There seems to be no other reason for the termination and in case there was one, nothing would have been as easy as putting it in black and white in the claimant's termination letter.

56. Whichever way one looks at it, it would only appear that the real reason for the claimant's termination was her pregnancy and the subsequent maternity leave. Ultimately, I find that the claimant was subjected to pregnancy discrimination which resulted in her termination.

Whether the claimant was subjected to unfair labour practices?

57. The claimant has submitted that she was subjected to unfair labour practices when she was terminated on account of her pregnancy. The respondent disagrees.

58. Article 41(1) of the Constitution guarantees every person the right to fair labour practices. The term "unfair labour practices" has not been given any specific definition under the law hence the circumstances of each case would determine if indeed there was an unfair labour practice in the course of an employment relationship.

59. The claimant was terminated on the same date she delivered her baby. This was the effective date of her maternity leave. It was her testimony that she had just delivered her baby via caesarian section and was still recuperating in the hospital when she received a call from a rider who introduced himself as "Ezekiel". The reason he was contacting her, was because he had an urgent package for her. Alas! to her surprise, the package was her termination letter. The claimant has termed this act on the part of the respondent as cruel, callous and inhumane.

60. The circumstances pertaining this case left the claimant unprotected as regards her employment. Besides, the nature and timing of her termination all indicate unfair labour practices. The claimant's termination came at a time when she had just commenced her maternity leave and had a new born baby hence needed the job more than ever.

61. Further, given the cordial relationship she had enjoyed with the respondent during her probation, one can guess that the last thing on her mind was termination. In the ordinary sense of life, that's the least kind of package one would expect when lying in a hospital bed. The termination must have therefore come as a shock to the claimant. Besides, no reasons were given for the termination hence she could only be left to wonder why.

62. These set of circumstances pertaining the respondent's action was by all means unjustified hence amounted to unfair labour practices against the claimant and I so find.

Remedies available to the claimant

63. Having found that the claimant has demonstrated that she was discriminated on account of her pregnancy and that she was unfairly terminated, the next issue for determination is what remedy avails to her.

64. In the case of **NEC Corporation v Samuel Gitau Njenga [2018] eKLR**, the Court of Appeal concurred with the holding in the GMV case to the effect that;

"the court does not think however that violation of every conceivable contractual statutory and constitutional right deserves a separate award of damages."

65. I fully agree hence, I will decline to award the claimant general damages in the sum of Kshs 5,000,000 as prayed. Instead, I will award compensatory damages equivalent to 10 months gross salary, pursuant to section 49 (1) (c) of the Employment Act. This award has been informed by the nature of the claimant's termination and the manner in which the same termination was undertaken. The respondent was unable to demonstrate any wrongdoing on the claimant's part to warrant the termination. In addition, the said termination was conducted in the most inhumane manner. Indeed, and as I have found herein, the claimant was subjected to unfair labour practices by the respondent hence this award.

66. I will also award the claimant gross pay for the period she was on maternity leave. This is based on the fact that the termination kicked in on the first day of her maternity leave. Therefore, her right to go on maternity leave with full pay pursuant to section 29(1) of the Employment Act, had accrued.

67. In the final analysis I enter Judgment in favour of the claimant as follows;

(a) A declaration that the Claimant's termination by the Respondent was on account of her pregnancy, hence discriminatory, unfair, unlawful, and in violation of Articles 41(1) and 27 (5) of the Constitution, sections 5(3) and 46 (a) of the Employment Act 2007 and the ILO Convention No. 183 of 2000 on Maternity Protection.

(b) The claimant is awarded compensatory damages in the sum of Kshs 1,100,000/= which sum is equivalent to 10 months gross salary.

(c) The claimant is awarded 3 months' gross salary for the period she was on maternity leave. This translates to the sum of Kshs 330,000/=.

(d) The total award is Kshs 1,430,000/=.

(e) The claimant shall have the costs of the suit.

(f) Interest on the amount in (d) at court rates from the date of Judgement till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Burugu

For the Respondent Ms. Kamau

Court assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had 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.

STELLA RUTTO

JUDGE