



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 241 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 162 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE VIOLATION AND CONTRAVENTION OF

ARTICLES 27, 28 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 40 AND 45 OF THE EMPLOYMENT ACT CAP 226

BETWEEN

MAUREEN ANGELINE OKINDA.....PETITIONER

VERSUS

JAMBO SHOP LIMITED.....RESPONDENT

JUDGMENT

1. The Petitioner sued the Respondent seeking judgment against the Respondent for:-

- a) A declaration that the Respondent violated the rights of the Petitioner under Articles 27, 28 and 47 of the Constitution.
- b) A declaration that the Respondent breached the Contract of Employment by failure to provide a medical cover for the Petitioner.
- c) Damages for discrimination on account of pregnancy and denial of right to dignity with interest thereon from the date of judgment until payment in full.
- d) General damages for breach of contract.
- e) General damages for unfair termination.
- f) Payment of all salary deductions.
- g) Any other orders/ reliefs that this honourable court may seem fit.
- h) Costs of this Petition.

2. The Petitioner avers that she was employed by the Respondent on 7th July 2018 as Category Manager on a 2-year renewable contract and that she when she got pregnant, she notified the employer in September 2018. She avers that she unfortunately had a troublesome pregnancy and was in and out of hospital for the first three months and the Respondent began being hostile to her and constantly accused her of non-performance. The Petitioner avers that she also experienced unnecessary salary deductions and was forced to forfeit many leave days and that the Respondent then began to pressure her to resign and further put pressure on the HR Manager to sack her for being expensive to keep.

That her dignity was constantly under attack during the monthly meetings where she would receive a thorough dress down from the Country Director on allegations of non-performance. She contends that she was entitled to a medical cover under her contract of service but incurred a lot of medical expenses and missed several doctor's appointments since the Respondent did not provide the same. She further avers that when she returned from her maternity leave in September 2019 she was immediately asked to resign and when she refused to do so, was summarily terminated by the employer on 16th September 2019. The Petitioner avers that the Respondent violated Article 27 of the Constitution which prohibits discrimination on any ground including pregnancy; Article 28 which provides the right of every person to inherent dignity and to have that dignity respected and protected; and Article 47 which protects the right to fair administrative action. The Petitioner avers that contrary to the said Constitutional provisions, the constant accusations of non-performance mostly during her pregnancy and while on maternity leave were malicious, and especially being accused of not performing even while on maternity leave. That she had to endure a toxic working environment and assigned a category of selling fashion which was not fast-moving and the same used as a basis of her evaluation and that her products were also not being pushed because of sabotage by the marketing team. Further, while on maternity leave her salary was delayed without any justifiable reason and led to untold financial suffering and when she refused to bow to the Respondent's pressure to resign, she was fired. The Petitioner believes that the Respondent terminated her employment mainly because of her pregnancy and the medical complications tied to it.

3. The Petitioner further avers that the Respondent never conducted any disciplinary hearing before terminating her employment on the basis of performance as required by law and that the grounds given for the termination are also curious and unlawful. That the Respondent cited redundancy as the reason for termination but never informed her and the Labour Office of any redundancy as required by law and that there was also no explanation as to how the decision to declare her redundant was reached, further because she was the only one affected. Further, that the Respondent never paid her severance pay for the alleged redundancy. In her Supporting Affidavit, the Petitioner depones that her duties included looking for vendors and signing them up on the Respondent's online platform, seller screening, listing targets and sales, product selection for promotion, deals and seller margin, and coordination with Accounts/Finance for payments to sellers. She further avers that after proceeding for maternity leave in the beginning of June 2019, she incurred medical expenses amounting to Kshs. 107,573.07 because the Respondent deprived her of a medical cover and that her June salary was also delayed by the then Finance Manager of the Respondent, Adarsh Agrawal, who claimed that there was no proviso for maternity leave in the company. That the said Adarsh also called to inform her that she would be paid only 30% of her salary during her maternity leave and that it was only after she challenged him to put the same in writing that he released her salary. Further, the Respondent also delayed her August 2019 salary for 16 days. She annexes several emails in support of her averments against the Respondent and also annexes her offer letter showing that the Respondent had offered a medical cover to her. The Petitioner depones that Sanjay sent her a termination notice via email on 16th September 2019 stating that her services were no longer required and she believes the termination violated the Constitution and Employment Laws.

4. Respondent's Case

The Respondent filed a Replying Affidavit sworn on 9th March 2020 by its Manager, Sanjay Pathak who avers that the Respondent had discovered that the medical documents presented by the Petitioner were fraudulently obtained for the sole purpose of getting sick leave. He depones that the Petitioner was the least performing personnel and when confronted she made false and baseless accusations. He admits that the Petitioner's contract of service included a medical cover but avers that the same was not achieved for all the employees due to financial constraints in the company and that the company however maintained monthly subscriptions to National Hospital Insurance Fund (NHIF) which the Petitioner could have utilized. It is his averment that the Petitioner was employed by the Respondent on contract basis and was hence not on permanent employment terms, that she was never arbitrarily dismissed and that upon termination of the contract she was paid one month salary in lieu of notice. He also contends that the Petition does not meet the constitutional threshold and that no damages are awardable to the Petitioner as she has not discharged her burden of proof on the claim for compensation. He prays for the Petition dated 17th December 2019 to be dismissed with costs.

5. The Petitioner then filed a Further Affidavit sworn on 13th October 2020 by Beth Murugi Wambugu who was formerly employed by the Respondent as a HR Manager on contract. Ms. Beth avers that she began facing some difficulty in the execution of my HR functions since the CEO, Sanjay, refused to follow the law in regards to basic human resource issues such as the confirmation of staff they had hired. That she continued to put Sanjay to task over the provision of a medical cover as had been stipulated in the employment contracts but he was noncommittal on delivering on this promise. She confirms the Petitioner informed her of her pregnancy in September 2018 and asserts that she had no issue with the Petitioner's diligence or work ethic as she performed well and met her expectations. She further avers that despite the Petitioner always producing the necessary medical proof and still putting in satisfactory performance, Sanjay complained of her missing her and began being hostile to her, picking on her and demeaning her and that he even encouraged some staff of Asian origin to demean her. It is also her averment that around November 2018, Sanjay called her to his office and told her to tell the Petitioner to resign because she was pregnant and not effective, that the Petitioner should go and raise her family and that "jobs will always be there". She further depones that this was not the only pregnant female being mistreated by the company as there was another employee named Grace Owour who received half pay during her maternity leave which started in November. She confirms that the Petitioner refused to resign as she was still meeting her performance obligations and there were no performance evaluations done to show that she was not performing. That following frustrations, interference and micromanagement in the execution of her HR functions, she resigned in November 2018 and also because the company was not interested in following the law which became a source of conflict every time she insisted they follow the law.

6. The case was to be determined on the basis of pleadings, affidavits and documents filed by the parties. Neither the Petitioner nor the Respondent filed submissions as directed by the Court on 4th October 2021. Be that as it may, the Court renders its verdict. The Petitioner asserts mistreatment by the Respondent's officials when she got pregnant. The Petitioner asserts that the Respondent's managers were hostile to her and constantly accused her of non-performance. She also experienced unnecessary salary deductions and was forced to forfeit many leave days and that the Respondent then began to pressure her to resign and further put pressure on the HR Manager to sack her for being expensive to keep. Her dignity was constantly under attack during the monthly meetings where she would receive a thorough dress down from the Country Director on allegations of non-performance. The Petitioner contends that she was entitled to a medical cover under her contract of service but incurred a lot of medical expenses and missed several doctor's appointments since the Respondent did not provide the said cover. To make things worse, when she returned from her maternity leave in September 2019, the Petitioner was immediately asked to resign and when she refused to do so, was summarily dismissed on 16th September 2019.

7. Yet again we have a misogynistic employer who makes life miserable for female employees when they fall pregnant. The affidavit by the

former HR Manager of the Respondent Miss Beth Murugi Wambugu is quite telling. As a HR manager she tried to guide the Respondent to proper HR practice but the Respondent was having none of it. The Respondent repeatedly contravened Article 27 of the Constitution which prohibits discrimination on any ground including pregnancy. To boot, the Respondent breached Article 28 with elan. Article 28 provides the right of every person to inherent dignity and to have that dignity respected and protected. As an employer it miserably failed to protect its female employees and as a consequence also breached Article 47 which protects the right to fair administrative action. The Respondent being guilty of these infarctions against the supreme law of the land must suffer sanctions. I hereby enter judgment for Petitioner as against the Respondent as follows:-

- 1) A declaration do and is hereby issued that the Respondent violated the rights of the Petitioner under Articles 27, 28 and 47 of the Constitution.
- 2) A declaration do and is hereby issued that the Respondent breached the Contract of Employment by failure to provide a medical cover for the Petitioner.
- 3) The Respondent do pay the Petitioner the sum of Kshs, 1,000,000/- for the breach of Articles 27, 28 and 47 of the Constitution of Kenya.
- 4) The Respondent do pay 3 months salary as compensation for the unlawful dismissal from employment – Kshs. 330,000/-
- 5) Costs of the suit.
- 6) Interest on the sums in 3 and 4 above at Court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2021

NZIOKI WA MAKAU

JUDGE