



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E017 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS AND ARTICLE 2, 3, 22, 23, 27, 41 AND 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION AND VIOLATION OF ARTICLE, 2, 3, 22, 23, 27, 41 AND 48 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF DISCRIMINATION OF WINNIE TREEZER OCHIENG ON ACCOUNT OF PREGNANCY

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

WINNIE TREEZER OCHIENG.....PETITIONER

VERSUS

LABEL CRAFT (K) LTD.....RESPONDENT

JUDGEMENT

1. The Petitioner, Winnie Treezer Ochieng, filed a petition dated 18<sup>th</sup> January 2021 seeking the following orders:

i. A Declaration that the acts of the Respondent are discriminatory against the Petitioner on account of pregnancy and in violation of the Constitution of Kenya, 2010.

ii. A Declaration that the acts of the Respondent amount to constructive dismissal, unfair and unlawful termination of employment.

iii. General damages for discrimination on account of pregnancy and subjecting the Petitioner to servitude and mental torture.

iv. An Order for the Petitioner to be compensated for unfair and unlawful dismissal as follows;

a.. Three months' salary in lieu of notice..... Kshs.105,000

b.. Salary for remaining contract period 8 months x 35,000

(June 2020 to January 2021)..... Kshs.280,000

c.. *Compensation for unfair, unlawful and constructive*

*dismissal 12 months x Kshs.35,000..... Kshs.420,000*

d.. *Unpaid Leave Days for 1 year..... Kshs.35,000*

**TOTAL..... Kshs.420,000**

v. *Costs of the Petition and Interest on (iv) above at Court rates.*

vi. *Certificate of Service of the Petitioner.*

## **Background**

2. The Petitioner avers that she was employed by the Respondent on 1<sup>st</sup> August 2019 as a Sales and Marketing Officer at a monthly salary of Kshs.35,000/=. She was on probation until 1<sup>st</sup> January 2020 where the Respondent confirmed her employment.

3. However, she also states that on or about 1<sup>st</sup> January 2020, the Respondent issued her with a one year contract commencing from 1<sup>st</sup> January 2020 and ending on 31<sup>st</sup> January 2021. She avers that the Respondent failed to issue her with the final executed contract for reasons best known to it.

4. The Petitioner avers that she performed her duties diligently from her employment date to sometime in April 2020 when the working environment became unbearable. That on or about April and May 2020, through a well calculated move, the Petitioner's immediate supervisor, one Timothy Wachira, an employee of the Respondent, started harassing the Petitioner making it difficult for her to work peacefully leading to constructive dismissal of the Petitioner.

5. The Petitioner states that her supervisor, after becoming aware that she was pregnant started harassing and discriminating her at her work place. She avers that he had orally threatened to ensure she would be dismissed from work employment that she was pregnant and lazy. In addition, she states that the supervisor informed her that the Respondent had earlier dismissed one Faith Mercy Njeri Ngugi just after her maternity leave.

6. The Petitioner avers that the Supervisor's actions caused her a lot of mental anguish and humiliation and upon reporting the matter to the Human Resource Officer orally, no action was taken to safeguard and guarantee her a safe work environment.

7. The Petitioner avers that on 29<sup>th</sup> May 2020, things got out of hand and her supervisor instructed her not to report to work on 2<sup>nd</sup> June 2020 on grounds of laziness due to her pregnancy. As a result of this and coupled with the humiliation and discrimination she had suffered previously, the Petitioner states that she resigned from work vide a letter dated 4<sup>th</sup> June 2020 which was sent via email.

8. The Petitioner contends that her rights under Articles 2, 3, 22(1), 23(1), 27, 41, 47 and 48 of the Constitution were violated, hence the petition.

## **Respondent's Case**

9. The Respondent filed a Response to the Petition dated 1<sup>st</sup> March 2021 and Replying Affidavits sworn by Timothy Wachira – Marketing Manager and Judy Koech – Human Resource Manager, both dated 4<sup>th</sup> March 2021 denying each and every allegation contained in the Petition.

10. Mr. Wachira avers contrary to the Petitioner's allegations, their working relationship was always good and that no allegations concerning sexual harassment by himself were raised by the Petitioner. In addition, he avers that Petitioner failed to report to the Human Resource Manager or to the directors the alleged sexual harassment by me despite the existence of a Sexual Harassment Policy in the company.

11. He states that the hiring and dismissal of staff was vested on the directors of the company and not on him as a supervisor. On the allegations of discrimination based on pregnancy, he avers that very few people, including himself, knew that the Petitioner was pregnant since it must have been in its initial development stage and as such the issue of harassment by him due to her pregnancy is not true.

12. Ms. Koech reiterated the averments made by Mr. Wachira.

13. In conclusion, the Respondent wholly denies discriminating the Petitioner on account of pregnancy or constructively, unlawfully and unfairly dismissing her and prays that the Court dismisses the Petition with costs.

14. In addition, the Respondent makes a counterclaim demanding from the Petitioner the equivalent of one month's salary of Kshs.35,000/=-, in lieu of notice, for breach of her employment contract.

## **Petitioner's Rejoinder**

15. In a rejoinder to the respondent's response; the Petitioner filed a Supplementary Affidavit sworn on 21<sup>st</sup> April 2021. She denies the contents of the Replying Affidavits in toto, stating that the same are unsubstantiated and baseless allegations.

16. The Petitioner reiterated that she had made complaints about sexual harassment to the Human Resource Manager, Judy Koech. In addition, she avers that Ms. Koech had mentioned that there was nothing she could do and further stated that he (Timothy) was fond of treating women employees that way.

17. As for the hiring and firing powers of Mr. Wachira, the Petitioner avers that as far as she was concerned, she was interviewed by him and had also communicated to her that she had been hired to the said position. As such, therefore, those allegations are not true.

18. As regards the counter claim, the Petitioner avers that the Respondent intentionally and constructively put her under very difficult circumstances and work environment. That she had to resign from employment, and therefore she ought not be compelled to pay the Respondent the one month's salary in lieu of notice since she could not give the said notice.

## **Evidence**

19. The Petitioner testified while the Respondents called two witnesses to testify.

20. The Petitioner adopted her witness statement dated 10<sup>th</sup> June

21. 2021 and other documents as her evidence in chief. She testified that she did not receive the show cause letter dated 3<sup>rd</sup> June 2020 and confirmed that her last day at work as 30<sup>th</sup> May 2020. She testified that she sued for unfair termination. In addition, she testified that she could not give notice to the respondent due to frustration at work.

22. On cross examination, the Petitioner testified that her duties as a Marketing Executive (sales) was to outsource clients, visit existing, look for new clients and collect debts from clients. In addition, she testified that she could not give notice to the respondent due to frustration at work.

23. The Petitioner testified that the company structure did not allow her to access the director. That she did inform Human Resource of her frustration who in turn told her to ignore RW1 and that nothing could be done. When questioned about her resignation, she testified that she sent her resignation letter via email. The email on record is dated 22<sup>nd</sup> June 2020.

24. On re-examination, the Petitioner confirmed that she did not have a good working relationship with her Supervisor and insisted that the threats and harassment from him were factors that led to her resignation.

25. The Respondent called two witnesses to testify. **RW1, MR. TIMOTHY WACHIRA KIHARA;** and **RW2 MS. JUDY KOECH,** who adopted their replying affidavits as evidence.

26. RW2 testified that the Petitioner gave no notice of leaving employment which led to the issuance of a show cause letter dated 3<sup>rd</sup> June 2020. She stated that the Petitioner was not at work to receive the same.

27. On cross examination, RW2 testified that there was no disciplinary action that was taken against the Petitioner.

28. Upon re-examination, RW2 concluded that the Respondent had played no part in the Petitioner's resignation and was therefore not liable to pay for the unserved term of the contract.

29. Parties thereafter were directed to file submissions. At the time of retiring to write this judgement only the Respondent had filed its submissions.

## **Respondent's Submissions**

30. Counsel for the Respondent explained the concept of constructive dismissal by placing reliance on the Court of Appeal case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR**. Counsel submitted that it is not sufficient to plead constructive dismissal as evidence is required to prove that the conduct of the employer was intolerable leading to resignation from employment.

31. Additionally, Counsel relied on the case of **Lear Shighadi Sinoya v Avtech Systems Ltd (2017) eKLR** which addressed the test of constructive dismissal. He submitted that for the same to hold, the first test would be for the Court to identify an express or implied contract term that has been breached and determine whether that breach was sufficiently serious to constitute constructive dismissal. Based on the above, Counsel argued that the Petitioner did not show that her employer's behavior was so heinous and intolerable, that it made it considerably difficult for her to continue working. In addition it was submitted that the Petitioner did not exhaust the laid down channels of handling complaints by reporting to the proper channels before resulting to resigning.

32. On discrimination on account of pregnancy, Counsel submitted that as per the Court's holding in **GMV v Bank of Africa Kenya Limited (2013) eKLR**, the employee has to prove that she was in a protected class and suffered adverse employment directly or indirectly as a result of her pregnancy. Counsel maintained that the Respondent was not aware of the Petitioner's pregnancy and denies that she suffered adverse employment action directly or indirectly as a result of her pregnancy.

33. In conclusion, Counsel submitted that the Petitioner had failed to prove unlawful and unfair constructive dismissal. As such, she could be compensated as prayed in her petition. He urged the Court to dismiss the petition and the Petitioner be condemned to pay costs.

### **Analysis and Determination**

34. From the pleadings, evidence on record and submissions, the issues that commend themselves for determination are the following:

- (i) *Whether the Petitioner was constructively dismissed;*
- (ii) *Whether the Petitioner was sexually harassed by the Supervisor;*
- (iii) *Whether the Petitioner is entitled to the reliefs sought.*

35. Although the provisions of the Employment Act do not expressly recognize constructive dismissal as a method of termination of an employment contract, it is recognized by the Kenyan jurisprudence from courts.

36. According to **Blacks Law Dictionary 10<sup>th</sup> Edition** constructive dismissal is defined as –

***“An employer’s creation of working conditions that leave a particular employee or group employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment: an employer’s course of action that, being determinate to an employee, leaves the employee almost no option but to quit.”***

37. In **Western Excavating ECC Ltd v Sharp [1978] 2WLR 344** explained constructive dismissal as follows;

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”*

38. In **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** the Court of Appeal established the test and principles for ascertaining whether a constructive dismissal has taken place as follows –

*“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test.”*

39. In addition, the Court laid down the guiding principles in making a determination whether or not constructive dismissal has taken place. The principle was applied in **Joseph M. Kivilu v Kenya National Examination Council [2021] eKLR**.

40. In the instant case, the Petitioner resigned by a letter dated 4<sup>th</sup> June 2020 sent to the Respondent on 22<sup>nd</sup> June 2020, the effective resignation date. The letter alleges that she had been having issues with her immediate Supervisor, Mr. Timothy Wachira and “*found them too personal as they were not professional*”. That he had been harassing her since April 2020 with threats of firing her and causing her emotional torture due to her pregnancy which was a personal issue.

41. She alleged that the Supervisor did not once acknowledge her efforts notwithstanding the efforts she was expending in the circumstances and did not support her to perform, in the midst of the COVID-19 pandemic. That she had been instructed not to report to work if Powerstar Zimmerman Supermarket would not have paid the amount due. It is evident that this was a problematic customer and the Petitioner appear to have reached a dead end.

42. The Petitioner laments that –

*“All this has been depressing. Most of the time I was in and out of the Hospital due to the severe headaches caused by stress and threats from Timothy at my critical time of being pregnant. He has never wanted me there, I gave it my all when working there but my own Supervisor has been fighting me ever since, it is hard to work under such circumstances.*

*... I was unable to come to work since the said date, since the working environment was too harsh for me due to the insults from him, the pressure, me being gossiped on my pregnancy.”*

43. The Petitioner testified that she reported her frustrations to the Human Resource Manager but the same was dismissed and could not muster the courage to report to the Directors due to seniority.

44. The Petitioner told the Court that she had confided to a lady friend about her tribulations at the Respondent's but did not invite her to testify. Similarly, she disclosed that she had a diploma qualification.

45. It is important to note that the contract of employment between the Petitioner and the Respondent had a monthly target of Kshs.750,000/= for the Petitioner who must have appreciated the enormity of the task and it was the duty of the Supervisor to ensure that she applied herself to meet the target. But more importantly, being a new employee, the Petitioner required support and facilitation in every respect to navigate the challenging job of marketing.

46. From the evidence on record the Petitioner does not appear to have received all the support and facilitation required and the Supervisor appear to have been hard on her in ensuring that payments were made by clients and in particular Powerstar Supermarket, Zimmerman.

47. The Petitioner confirmed on cross examination that even the Supervisor was unable to secure payment from this client, who the Petitioner had brought on board.

48. The Court is also alive to the fact that the circumstances arose in the midst of the COVID-19 pandemic which made the situation more challenging.

49. On re-examination the Petitioner confirmed that she resigned "*because of COVID-19 since she felt vulnerable and harassment was also a factor*".

50. The Petitioner's resignation letter tabulates the tribulations she had to endure which taken together demonstrate an intolerable work environment. The tone of the letter is emblematic of person who had tried their best in the circumstances but failed owing to hard working environment.

51. From the evidence on record, it does appear that the Petitioner had reached the end of her tether and the only option available to her was to quit which she did by a letter dated 4<sup>th</sup> June 2020.

52. The Court is satisfied that the Petitioner has on a balance of probabilities shown that the work environment was harsh, unsupportive and un-facilitative, and was thus constructively dismissed.

### **Sexual Harassment**

53. In their **General Survey of 1988**, the **Committee of Experts of the ILO** provided a catalogue of examples of sexual harassment to include insults, remarks, instructions and inappropriate comments on a person's dress, physique, age or family situation and a condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit or explicit, whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching caresses, pinching or assault.

54. In **Vishaka & Others v The State of Rajasthan & Others [JJ, 1997], [7] [SC 384]**, the Supreme Court of India agreed with the **ILO Committee of Experts on Sexual Harassment** to include unwelcome determined behaviour, whether direct or indirect, such as physical contact and advances, sexual favours, sexually coloured remarks showing of pornography, and other verbal and nonverbal conduct of a sexual nature that is unwelcome or humiliating to the woman.

55. More importantly, Article 27 of the Constitution of Kenya 2010 is emphatic that every person has right of equality and freedom from discrimination. Relatedly Article 28 guarantees the right to human dignity "***Every person has inherent dignity and his right to have that dignity respected and protected***".

56. Although the Petitioner did not specifically plead sexual harassment, the issue was referred to in the affidavits of Judy Koech and Mr. Timothy Wachira on record. In a similar vein, the Petitioner made reference to issues that were "*too personal and not professional*" but did not elaborate or provide particulars.

57. From the evidence and documents on record, the Court is satisfied that the Petitioner neither pleaded nor alleged sexual harassment. In addition, the petition does not set out particulars of sexual harassment.

### **Discrimination on the ground of pregnancy**

58. Article 27(4) of the Constitution of Kenya is unambiguous that every person has the right to equality and freedom from discrimination. A person shall not be discriminated on the ground of race, sex, **pregnancy**, marital status, health status, ethnic and social origin and colour, age, disability, religious conscience, belief, dress, culture, language or birth.

59. Section 5(2) and (3) of the Employment Act provides that

**(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.**

**(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —**

**(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;**

**(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.**

60. Section 5(6) of the Act provides that –

**(6) An employer who contravenes the provision of the section commits an offence.**

61. The question of discrimination on the basis of pregnancy was considered by this Court in **G M V v Bank of Africa Kenya Limited [2013] eKLR** where the Court stated –

*“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(7) of the Employment Act 2007, which states:*

***“In any proceedings where a contravention of Section 5(3) is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission is not based on any grounds specified in this Section.”***

*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.”*

62. The Court further stated 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.*

63. Did the Petitioner satisfy the criteria formulated in **G M V v Bank of Africa Kenya Limited (supra)**? This is a matter for the Court to determine.

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

64. It is not in dispute that the Petitioner was employed by the Respondent on 1<sup>st</sup> August 2019 as a Sales and Marketing Officer at a monthly salary of Kshs.35,000 and was issued with a written contract of employment on or about 1<sup>st</sup> January 2020. The contract was for the year 2020 only.

65. Evidence on record shows that the Petitioner was not pregnant when she joined the Respondent in 2019 or when she signed the contract of employment dated 1<sup>st</sup> January 2020.

66. The Petitioner alleges that –

*a. The Supervisor orally threatened to ensure that the Petitioner would be dismissed from work stating that the Petitioner was pregnant, lazy and unable to collect the aforesaid debt.*

*b. The Supervisor orally informed the Petitioner that the Respondent was not interested in keeping and employing pregnant women since they are generally lazy.*

*c. The Supervisor informed the Petitioner that the Respondent had earlier dismissed other women employees who were pregnant.*

*d. The Supervisor making humiliating remarks about the Petitioner's state of being pregnant and even once told the Petitioner in the presence of other employees and colleagues that “You should just stay at home with your husband with your pregnancy, since you*

are not useful here”.

e. The Supervisor went on to inform other staff members that the Petitioner was lazy and incompetent due to her pregnancy and made her a laughing stock at the work place.

67. The Supervisor, RW1, Mr. Wachira denied these allegations. He told the Court that he had a good working relationship with the Petitioner and only come to learn of her pregnancy in June 2020 after she had resigned

68. RW2, Judy Koech who was the Head of Human Resource of the Respondent testified that the Petitioner did not lodge any complaint of harassment by the Supervisor with her and had only complained about a Cleaner. She told the Court that the Petitioner had access to the Directors. She also confirmed that she learnt of the Petitioner’s pregnancy when she received her resignation letter on 22<sup>nd</sup> June 2020.

69. On cross examination, the Petitioner confirmed that harassment started in March 2020 and had not confided to the Supervisor that she was pregnant.

70. A medical report, on record dated 28<sup>th</sup> April 2020, provided by the Petitioner reveals that as at that date the foetus was 5 weeks and 2 days old which implies that conception took place around 22<sup>nd</sup> March 2020. A further report dated 9<sup>th</sup> June 2020 shows that as at that date, the foetus was 11 weeks, 5 days old, about 3 months. This report was prepared after the Petitioner had left employment.

71. In her supplementary affidavit dated 21<sup>st</sup> April 2021, the Petitioner states that her Supervisor and colleagues were aware of the pregnancy because she was putting on maternity dresses and the pregnancy was visible being the second one and she took off days due to early pregnant complications.

72. Finally in her resignation letter, the Petitioner states –

*“The (Supervisor) could also ask my colleagues about my pregnancy and yet am just across his office. He could not bring himself to ask me the question himself. That caused me a lot of stress and embarrassment and I felt discriminated at the work place.”*

73. From the evidence on record it is not in dispute that the Petitioner did not report the fact of being pregnant to anyone at the Respondents, not even the Human Resource Department. The Respondent was therefore not aware that she was pregnant. It is unclear how RW1 came to learn of the Petitioner’s pregnancy. In a similar vein, none of the colleagues who allegedly heard the words attributed to the Supervisor was named or called as a witness. The Petitioner confirmed to the Court she had confided to one person who she did not call as a witness to buttress her evidence.

74. The upshot of it all is that the Petitioner has not established that she belonged to a protected class.

**(ii) Has the Petitioner demonstrated that she qualified for the job she lost?**

75. It is not in dispute that the Petitioner was interviewed for the position of Sales Executive Officer and recruited competitively and performed her duties.

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

76. As adverted to above, the Petitioner resigned on 22<sup>nd</sup> June 2020 through a letter dated 4<sup>th</sup> June 2020. The email forwarding the letter is dated 22<sup>nd</sup> June 2020 and having found that the Petitioner was constructively dismissed on 22<sup>nd</sup> June 2020, it is evident that by this date, the Respondent was unaware of her pregnancy. The medical report dated 28<sup>th</sup> April 2020 had not been availed to the Respondent for its records.

77. In sum, the Petitioner has not established this criterion.

**(iv) Has the Petitioner established that there is a nexus between the adverse employment action, directly as a result of her pregnancy?**

78. As stated above since the Petitioner did not establish that she had notified the Respondent that she was pregnant by 22<sup>nd</sup> June 2020, the Respondent was unaware of her condition and could not have relied on a nonexistent state of affairs to take any action.

79. On re-examination, the Petitioner stated as follows: *“I resigned because of COVID-19 and felt vulnerable. Harassment was another factor in the resignation.”*

80. Based on the foregoing, it is the finding of the Court that the Petitioner has not established the prima facie case formulated in in **G M V v Bank of Africa Kenya Limited (supra)**.

81. On reliefs, the Petitioner prays for –

**(a) Three (3) months’ salary in lieu of notice Kshs.105,000**

82. It is unclear how the 3 months' notice was arrived at since the contract signed on 1<sup>st</sup> January 2020 is silent on termination. The Court awards one month's salary in lieu of notice **Kshs.35,000/=**.

**(b) Unpaid leave days for one year**

83. Annual leave is a statutory entitlement under Section 28(1) of the Employment Act of not less than 21 working days. The Petitioner served and is entitled to prorated leave for 10 months of **Kshs.20,417/=**.

**(c) Salary for the remaining contract period of 8 months Kshs.280,000**

84. This is a claim for anticipatory earnings. A similar issue was addressed in **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR** where Rika J. held that –

*“This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”*

85. Courts have been reluctant to award anticipatory earnings.

86. In **National Social Security Fund v Grace K. Kazungu & another [2018] eKLR**, the Court of Appeal cited its earlier decision in **Elizabeth Kanyi Kibe v Telkom Kenya Limited [2014] eKLR** and held as follows –

*“This Court held that employees have the obligation to move on, and look for fresh employment after termination, and not sit back in the hope of enjoying anticipatory remuneration. Employment remedies must be proportionate, and employees must be discouraged from replicating employment wrongs and multiplying remedies. These principles were observed in the case of **Maria Kagai Ligaga vs. Coca Cola East & Central Africa Industrial Court Cause [Nairobi] Number 611 [N] of 2009**. (See also subsequent **Civil Appeal between Coca Cola East & Central Africa Limited vs. Maria Kagai Ligaga [2015] e-KLR**. It is now settled that employees are expected, under Section 49 (1) of the Employment Act, to reasonably mitigate their losses.”*

87. The Court agrees with these sentiments. The Petitioner herein claims for compensation as well as salary for the remaining contract period. It would be injudicious to award both. For these

reasons the claim is **declined**.

**(d) Compensation for unfair/constructive dismissal (12 months x 35,000)**

88. The remedy of compensation under Section 49 of the Employment Act is discretionary. However, the Court is enjoined to exercise its discretion on the basis of the criteria prescribed by Section 49(4) of the Act.

89. In the case herein the Court has considered the following –

- i) The Petitioner had served for 10 months and wished to continue
- ii) The Petitioner was free from blame
- iii) The Petitioner did not enjoy her work as she should have
- iv) Failure of the Petitioner to confide in a person who could have voiced her issues.

90. Having taken into account these factors, the Court is satisfied that the equivalent of 6 months' salary **Kshs.210,000/=** is fair.

**(e) Declaration that the acts of the Respondent are discriminatory against the Petitioner on account of pregnancy and a violation of the Constitution of Kenya 2010**

91. Having found that the Petitioner did not satisfy the criteria in **G M V v Bank of Africa Kenya Limited (supra)**, the prayer for a declaration is declined.

**(f) Declaration that the acts of the Respondent amount to constructive dismissal, unfair and unlawful termination of employment**

92. Having found that the Petitioner was constructively dismissed, a declaration to that effect is hereby issued.

**(g) General damages for discrimination on account of pregnancy and subjecting the Petitioner to servitude and mental torture**

93. Having found that the Petitioner did not on a balance of probabilities establish that she was discriminated on the account of pregnancy in (e) above, the prayer for damages for discrimination, servitude and mental torture is rejected and dismissed.

**Respondent's Counter claim Kshs.35,000**

94. Although the Respondent prepared a show cause letter dated 3<sup>rd</sup> June 2020 after the Petitioner failed to report to work on 2<sup>nd</sup> June 2020, it did not forward the letter to the Petitioner through her email address or in any other way. The Petitioner was unaware of it and could not respond to it. In addition, the Respondent did not demonstrate what action it took thereafter for purposes of closure of the issue. The Petitioner's response to the show cause letter would have determined the next course of action for the Respondent.

95. The counter claim is consequently rejected and dismissed.

**Conclusion**

**96. In conclusion, judgment is entered for the Petitioner for the sum of Kshs.265,417/= with costs. Interest at court rates from the date of judgment till payment in full.**

97. Certificate of Service to issue.

98. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF NOVEMBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**