



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 657 OF 2017**

**CAROLINE MUENI MBITHI.....CLAIMANT**

**VERSUS**

**MURI MWANIKI & WAMITI ADVOCATES.....RESPONDENT**

**JUDGEMENT**

1. The claimant commenced the instant suit vide a statement of claim filed on 6<sup>th</sup> April, 2017, through which she alleges that while serving under the employment of the respondent, she was subjected to discrimination on account of her pregnancy. Accordingly, she prayed for compensatory damages for wrongful dismissal, October salary, maternity leave payment, service gratuity and 3 months salary in lieu of notice.

2. The claim was disputed through the respondent's response filed on 24<sup>th</sup> July, 2017, and through which it averred that the claimant was terminated procedurally on account of misappropriation of funds. To this end, the respondent counter claimed against the claimant the sum of Kshs 108,015/= and prayed that the claim be dismissed with costs and its counter claim allowed.

**Claimant's case**

3. The matter proceeded for hearing on 6<sup>th</sup> October, 2021 and both sides tendered oral evidence.

4. At the start of the hearing, the claimant adopted her witness statement as part of her evidence in chief. She also sought to rely on her bundle of documents which she produced as exhibits before court. It was the testimony of the claimant that she was employed by the respondent sometimes in 2010. That on 25<sup>th</sup> October, 2016, when she was about to proceed on maternity leave, she was given a termination letter through which she was accused of misappropriation of funds. She denied misappropriating the funds belonging to the respondent and averred that prior to her termination, she had not been handling funds at the firm, as filing of pleadings was being undertaken by an outsider.

5. The claimant averred that her termination was a guise to exit her from the respondent firm on account of her pregnancy. She summed up her testimony by stating that she was not paid any terminal dues at the point of her dismissal.

6. During cross examination, the claimant admitted having taken maternity leave previously while at the respondent firm. She also admitted knowing of other employees at the respondent firm who had taken maternity leave and still retained their jobs. She also admitted that another colleague by the name Mr. Shimbala had been terminated around the same time as herself, over misappropriation of funds.

**Respondent's case**

7. The respondent called three witnesses to testify on its behalf. Mr. Mwaniki testified as RW1. He identified himself as a partner at the respondent firm and stated that he was the claimant's supervisor. He also sought to adopt his witness statement and the respondent's defence as part of his evidence in chief. It was his testimony that the claimant was employed as a court clerk by the respondent firm. That sometimes in September, 2016, an audit was commenced by the respondent. That the said audit revealed that the claimant had not accounted for the money she had collected for purposes of filing court documents.

8. It was RW1's testimony that the claimant was given an opportunity to render an explanation as to how she had utilized the money given to her, but she failed to do so, hence her termination from employment. RW1 further denied discriminating the claimant on account of her pregnancy and added that the respondent treats all its employees fairly and with dignity. He named several employees who had proceeded on leave while at the firm, and who still retained their jobs.

9. RW1 further stated that the claimant's maternity leave had already been approved on 7<sup>th</sup> October, 2016, long after the audit had commenced and that even after the claimant had left the respondent firm, it was ascertained that she had collected some money in the sum of Kshs 70,500/= from one of the Associates for filing of a suit, which apparently was nonexistent from the court records.

10. During cross examination, RW1 maintained that the claimant was accorded sufficient time to present her case and an opportunity to appear in the company of a colleague, but she chose not to do so.

11. Mr. Njuguna Muri testified as RW2. He also relied on his witness statement and asked the court to adopt the same as part of his evidence in chief. He also produced the bundle of documents filed on behalf of the respondent as exhibits before court. He told court that there was cause to terminate the claimant as she had failed to account for money given to her for purposes of filing court documents. He averred that the claimant was given an opportunity to account for the money but she failed to do so. He stated that for instance, the claimant received Kshs 3,500/= in respect of a file referenced M247/1 but she could only account for the sum of Kshs 3,080/= yet she never refunded nor accounted for the balance. He further informed court that the claimant was not terminated on account of her pregnancy as she had previously proceeded on maternity leave and indeed, her maternity leave had already been approved prior to her termination.

12. Mr. Charles Gichangi testified as RW3. He also relied on his witness statement, which he adopted as part of his evidence in chief. As per his testimony, he received money in the sum of Kshs 70,510/= from the respondent's accountant and handed over the same to the claimant so as to facilitate the filing a new suit. He averred that the claimant later gave him documents purportedly filed at the Chief Magistrate's court at Milimani, only for him to discover afterwards that the suit had not been filed at all, contrary to indication by the claimant.

13. In cross examination, RW3 confirmed that he did not have the evidence to confirm that he indeed handed over the money to the claimant.

### Submissions

14. Both parties filed written submissions upon close of the hearing. On her part, the claimant submitted that the respondent had failed to prove that there was a reason to dismiss her from employment. She placed reliance on the case of **Nicholas Otinyu Muruka vs Equity Bnak Limited ELRC No. 125 of 2013**. The claimant further submitted that she was not accorded a fair hearing since she was given an extremely short notice to present her defence and to appear for a disciplinary hearing. On this issue, she sought to rely on the authorities of **Vincent Nyachibwede vs Bob Morgan Services Limited (2018) eKLR** and **Paul N. Lusewiti vs Miami Enterprises Co. Limited (2014) eKLR**.

15. On its part, the respondent submitted that the claimant had failed to prove that her dismissal was based on unfounded allegations or that she was not afforded a chance to be heard as pleaded. It further submitted that it had discharged its duty to prove that it had not discriminated against the claimant on account of her pregnancy. It was also the respondent's submissions that it had valid reasons to dismiss the claimant. The respondent buttressed its submissions on several authorities including **Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 Others [2019] eKLR**, **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR**, **Anthony Nasenya Sakwa vs Capwell Industries Limited [2021] eKLR** and **Caroline Nyokabi Mwangi vs Achellis Kenya Limited [2021] eKLR**. As part of its submissions, the respondent stated that it accorded the claimant fair hearing as required under the law. On this issue, it relied on the case of **Sitienei vs Nandi Tea Estates Company Limited [2021] KECA 103 (KLR)**.

### Analysis and determination

16. From the pleadings by both parties, the evidence on record and the rival positions, to my mind, the court is being called to determine the following issues;

**i. Whether the claimant was discriminated on account of her pregnancy?**

**ii. Whether the claimant's termination was unfair and unlawful?**

**iii. Is the counter claim justified?**

**iv. What reliefs if any, avail to the claimant?**

### Whether the claimant was discriminated on account of her pregnancy

17. The claimant has attributed her dismissal from employment to the request she made for maternity leave, as she was due to deliver her baby. On that account, she alleged discrimination and prayed for compensatory damages.

18. This assertion has been disputed by the respondent who contends that the claimant was terminated on valid grounds as she had misappropriated funds from the firm.

19. Based on the contest presented before me, it is imperative to evaluate the evidence on record, so as to ascertain whether indeed, the claimant was subjected to discrimination on account of pregnancy.

20. Discrimination on grounds of pregnancy is frowned upon by the law and to this end, specific provisions of the law have expressly prohibited the same. Case in point 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.

21. In the case of **GMV vs Bank of Africa (2013) eKLR**, the court set out the following conditions as necessary to prove discrimination of a female employee on account of pregnancy;

i. Establish she belongs to a protected class.

ii. Demonstrate she qualified for the job she lost.

iii. 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.

iv. Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy.

22. It is therefore imperative to apply the foregoing conditions against the claimant's case so as to establish whether she was subjected to discrimination on account of pregnancy.

23. As regards the 1<sup>st</sup> condition, it is not in doubt that the claimant was pregnant and on that account, she belonged to a protected class. This is discernable by the safeguards which have been spelt out under Article 27(4) of the Constitution, sections 5(3) & 46 (a) of the Employment Act and international instruments for instance, the ILO Maternity Protection Convention Number 183 of 2000.

24. In respect of the 2<sup>nd</sup> condition, it is most probable that the claimant qualified for the job she lost, as she had worked for the respondent as a court clerk for a period of six years. Had she not been qualified, she would not have lasted that long at the respondent firm, undertaking the same job she was initially hired to do. There was also no evidence that her qualifications and competence were ever called into question.

25. That brings us to the 3<sup>rd</sup> condition, which is whether the claimant had demonstrated that she suffered adverse employment action, directly as a result of her pregnancy and provided prima facie proof, that other explanations by the employer are pretextual, in that the real reason for her termination was the pregnancy. On this issue, the respondent asserted that it had approved the claimant's application for maternity leave on 7<sup>th</sup> October, 2016. To this end, it produced the endorsed approval on the claimant's application for maternity leave.

26. The respondent further buttressed its assertions by proving that the claimant had been initially granted maternity leave sometimes in 2015. Indeed, the claimant admitted during cross examination, that it was not the first time she was applying for maternity leave while in the employment of the respondent.

27. The claimant also admitted during cross examination that she was aware of several employees within the respondent's employment, who had applied for, and successfully proceeded on maternity leave.

28. In view of the foregoing, the claimant did not prove that she had suffered adverse action as a result of her pregnancy. Merely stating that she had been discriminated on grounds of her pregnancy was not sufficient. She did not provide proof that the explanation by the respondent was pretextual and that the real reason for her termination was her pregnancy.

29. Lastly, the claimant had to prove that there was a nexus between her termination and her pregnancy. This condition is closely related to the 3<sup>rd</sup> one. As stated herein, the claimant did not establish that her termination was attributable to the pregnancy given that her maternity leave had been approved on 7<sup>th</sup> October, 2016, close to 19 days prior to her termination. The respondent was also able to prove that another employee by the name Mr. Richard Shimbala had been dismissed on similar grounds and that the claimant had previously proceeded on maternity leave. There was therefore no close nexus between her termination and her pregnancy.

30. In view of the foregoing, it cannot be said that the claimant was subjected to discrimination on account of her pregnancy and I so find.

#### **Whether the claimant's termination was unfair and unlawful?**

31. The claimant alleges that she was falsely accused of misappropriation of funds from the respondent firm. On the other hand, the respondent maintains that the claimant failed to account for monies given to her for official purposes.

32. Under the Employment Act, a termination will be deemed unfair if an employer fails to prove that there was substantive justification and that it did not take the employee through fair procedure prior to termination. Therefore, the court at this instance is being called upon to examine the circumstances under which the claimant's employment was terminated and determine whether there was justification to terminate her employment and whether she was subjected to fair process.

33. Substantive justification is provided for under sections 43 (1) and 45(2) of the Employment Act.

34. **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, while **section 45 (2)** provides that a termination of employment is unfair if the employer fails to prove-

**a) that the reason for the termination is valid;**

**b) that the reason for the termination is a fair reason-**

**i. related to the employee's conduct, capacity or compatibility; or**

**ii. based on the operational requirements of the employer; and**

**c) that the employee was terminated in accordance with fair procedure.**

35. It is therefore necessary to establish whether the reasons for the claimant's termination were fair and valid. Validity and fairness of the reason for termination can only be determined by considering the evidence presented by the respondent. As stated herein, the reason tendered by the respondent is that the claimant failed to account for monies given to her for official purposes. This fact was denied by the claimant.

36. In evidence, the respondent produced a schedule detailing the money the claimant had failed to account for. It also produced a report of the claimant's explanation as regards the funds she allegedly failed to render an account of. Finally, there is a schedule which sums up the monies in question vis a vis the claimant's explanation.

37. The allegations presented against the claimant border on dishonesty and lack of trust in the employment relationship.

38. The court of Appeal in the case of **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR**, cited with approval, the Canadian case of **Mc KINLEY –VS- B.C. TEL [2001] 2 S.C.R 161** in which it was held as follows;

**“[W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”**

39. As stated hereinbefore, the reason for which the claimant was dismissed related to honesty and trustworthiness in respect of funds issued to her by the respondent for official purposes. Failure to account for such monies was a serious issue that breached the trust that existed between her and the respondent.

40. The very nature of the claimant's duty required that once in a while, if not mostly, she would be given money to perform her duties of filing court documents. Therefore, trust and honesty were a very essential ingredient in the employment relationship. It was expected that she would account for all the monies issued to her. Failure to account for the money given to her, was a serious issue that went to the root of the employment relationship.

41. Moving forward, the respondent would have found it hard to issue her with any monies to undertake her core duties and which in turn, would have affected her performance of duty fundamentally.

42. Section 43(2) of the Act provides that the reason or reasons for termination of an employee are matters that the employer at the time of termination *genuinely believed to exist*, and which caused the employer to terminate the services of the employee. This was well espoused in the case of **Kenya Revenue Authority vs Reuvel Waithaka Gitahi & 2 Others [2019] eKLR**. In this respect, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt.

43. From the facts presented in the instant case, the respondent genuinely believed that the claimant had misappropriated its funds as she failed to render a proper account of the money issued to her for official purposes. In the circumstances, it can be said that the respondent had a fair and valid reason to terminate the claimant's services.

44. The second limb in determining the fairness of a termination is in regards to notification and hearing. The requirement for fair procedure is generally provided for under section 45 (2) (c) of the Act. Further, Section 41 (1) makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.

45. In this case, there is evidence that the process in regards to notification and hearing was undertaken. The question is whether the same was fair in the circumstances. This can only be ascertained by evaluating the process that the claimant was subjected to.

46. The claimant was issued with a notice to show cause on 19<sup>th</sup> October, 2016. The claimant signed as having received the same at 9:10 am. Through the said notice, she was required to tender her response to the allegations set out therein, by 2:00 pm, the very same day. Essentially, the claimant had about 5 hours to compile and prepare her defence.

47. The allegations levelled against the claimant were not brief and she may have required a considerable amount of time to respond to the same. It is therefore evident that the time given to the claimant was not adequate and reasonable in the circumstances.

48. Upon submission of her defence, the claimant was issued with a letter dated 24<sup>th</sup> October, 2016, through which she was required to appear on 25<sup>th</sup> October, 2016 at 2:00 pm for an oral hearing. The claimant has averred that she did not have enough time to prepare for the hearing nor look for a colleague to accompany her. On its part, the respondent contends that the claimant did not request for more time prior to the hearing. Be that as it may, it is not clear why the claimant was given such a short notice within which to appear for the disciplinary hearing.

49. In any event, the respondent would not have suffered any prejudice by allowing the claimant more time within which to tender her defence and appear for the hearing. The hearing appears to have been rushed hence it is more probable, that the time constraint affected the quality of the claimant's defence. It is not enough to grant an employee an opportunity to be heard, the same ought to be fair.

50. In the case of **Patrick Abuya vs Institute of Certified Public Accountants of Kenya (ICPAK) & another [2015] eKLR**, the court had this to say on the issue;

**“Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood. In my view, the Respondents action of writing an invitation letter on 3 March 2014 inviting the Claimant to hearing on the morning of 4 March 2014 when, according to it, he had absconded and therefore his whereabouts were not known was ill motivated and was not in consonance with the statutory requirements of procedural fairness. It was equally not in accord with justice and equity as envisaged by section 45(4)(b) of the Employment Act, 2007. The dismissal was therefore procedurally unfair.”**

51. In following with the above decision, I find that the claimant was not accorded procedural fairness on account of the short timelines granted to her, hence to that extent, her termination was unfair.

52. Consequently, in as much as the respondent may have had a valid and fair reason to terminate the employment of the claimant, it was duty bound to observe the requirements of fair procedure.

53. The totality of the foregoing is that the claimant’s termination was procedurally unfair and fell short of the legal parameters. To this end, I find that the same was not fair and lawful.

#### **Is the counter claim against the claimant justified?**

54. The respondent has averred that the claimant took money for purposes of filing court documents and failed to account for the sum of Kshs 37,505/=. The respondent further counter claimed against the claimant the sum of Kshs 70,510/= which she allegedly received from the respondent’s Associates, Charles Gichinga (RW3), but failed to account for the same.

55. In support of its counter claim, the respondent has annexed a schedule setting out the monies that were not accounted for by the claimant.

56. I have considered the notice to show cause through which the claimant was required to account for the monies she had received against her explanation which is attached to the response and which was produced as an exhibit before court. It is apparent that in some instances, the claimant did not render a proper account of the money given to her to undertake filing of court documents and to attend to other official duties.

57. It is also noticeable that she did not deny receiving the monies from the respondent firm. In most of the cases, for instance in files Ref E2/GEN, W29/1, W41/1 and /T31/1, the supporting documentation could only be availed by the claimant as she was the one who had been given the money to undertake certain court processes, hence she would ordinarily be issued with a receipt thereafter. From my perusal of the schedule produced before court, the claimant could not account for the money totaling Kshs 27,000/=.

58. As regards the sum of money given to the claimant by RW3, there was no evidence that the money was issued to her. The respondent did not produce any document for instance, a voucher or such other evidence to confirm that the claimant indeed received the money. It is no doubt that Kshs 70,510/= is not pocket change to be handed over casually. There ought to have been some form of supporting documentation evidencing receipt of the same by the claimant. None was produced at all.

59. The letter from the court registry disowning the receipt allegedly presented by the claimant is not and cannot be sufficient evidence to prove that she received the money from RW3. The respondent ought to have furnished more evidence to prove that indeed, RW3 handed over the money to the claimant.

60. In view of the foregoing, the counterclaim only succeeds to the extent of Kshs 27,000/= which I have found was not properly accounted for by the claimant.

#### **Available Reliefs**

61. Having found that the claimant’s termination was unfair, I now proceed to consider the reliefs available her in the circumstances.

#### **One month’s salary in lieu of notice**

62. Section 44(2) of the Employment Act prohibits an employer from summarily dismissing an employee without notice or with less notice while section 35 (1) (c) of the Act provides for a mandatory one month notice where an employee is on a monthly salary as the claimant herein. As such, and having found that the claimant’s termination was procedurally unfair, she is entitled to one month’s salary in lieu of notice.

#### **Salary for October, 2016**

63. The respondent has not disputed withholding the claimant’s salary for October, 2016. It is also not in dispute that she was terminated on 26<sup>th</sup> October, 2016 hence had worked for 26 days or so during that month. Subsequently, she is entitled to payment of salary for 26 days.

#### **Service Pay**

64. The claimant has prayed for service pay in the sum of Kshs 88,560/= for the period she worked for the respondent. **Section 35(6)** of the

Employment Act provides that service pay is only payable to employees who are not members of any pension scheme, provident fund or the National Social Security Fund (NSSF). The claimant confirmed in her testimony before court, that she was contributing to the NSSF and that deductions towards the fund were being effected from her salary. In light thereof, she falls within the ambit of exclusions stipulated under section 35 (6) (d) of the Act hence the claim under this head falls.

**Compensatory damages**

65. The claimant has prayed for compensatory damages in the sum of Kshs 307,008/= which is equivalent to 12 months of her gross salary then. As I have found that the claimant’s dismissal was procedurally unfair, I will award her compensatory damages equivalent to five (5) months’ gross salary.

**Orders**

66. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month’s salary in lieu of notice	25,584.00
Salary for 26 days worked in October, 2016,	22,172.80
Compensation equivalent to 5 months’ gross salary	127,920.00
Total	<b><u>175,676.80</u></b>

67. In view of the fact that the respondent’s counter claim has partially succeeded, the sum of Kshs 27,000/= will be set off against the award of Kshs 175,676.80, hence the final award stands at **Kshs 148,676.80**.

68. The final award, shall attract interest at court rates from the date of Judgment until payment in full.

69. Each party shall bear its owns costs given that the claim has been allowed and the counterclaim partially successful.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Mugo

For the Respondent Mr. Thige

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 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 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**