



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 109 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa 29<sup>th</sup> January, 2020)**

**ROSE WAMBUI KARANJA.....CLAIMANT**

**VERSUS**

**ABERDARE ENGINEERING LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed this suit on 30/1/2014, challenging the termination of her employment and non-payment of terminal dues. She seeks the following reliefs from this Court:-

- a. A declaration that the Claimant's dismissal was irregular, unfair and in breach of the Employment Act.*
- b. Compensation for wrongful termination pegged at 12 month's salary in the sum of Kshs. 400,000.00.*
- c. Payment of one month's salary in lieu of notice amounting to Kshs. 25,000.00.*
- d. Service pay for the three years worked amounting to Kshs. 37,500.00.*
- e. Unpaid maternity leave amounting to Kshs. 50,000.00.*
- f. Unpaid annual leave for the year 2014 amounting to KShs. 25,000.00.*
- g. Compensation at Kshs. 25,000.00 per month for extra services rendered to Arberdare Investments Limited from June 2011 to June 2014 amounting to KShs. 900,000.00.*
- h. Certificate of service.*
- i. Costs of this suit.*
- j. Any other/further relief that this Honourable Court may deem fit to grant in the interest of justice.*

2. It is the Claimant's case that she was employed as an Account Assistant by the Respondent pursuant to the letter of appointment of 30/08/2019 and earning a monthly salary of Kshs. 15,000.00, with effect from 22/07/2011.

3. The Claimant avers that in the course of her employment, she was assigned duties by Aberdare Investments Limited, a different entity from the Respondent, but was not compensated for the said services.

4. She avers that due to her good performance, her salary was reviewed upwards. She testified that on 3/05/2012, her salary was increased to Kshs. 19,750.00 and at the time of her termination, her salary was Kshs. 25,000.00.

5. It is the Claimant's case that she applied for maternity leave in her letter of 10/06/2014. In the letter, she set out the status of her outstanding assignments, the manner in which they were to be handled and her arrangements with her colleagues on the manner in which the assignments were to be done while she was on maternity leave. She avers that she worked until the last day, to ensure the records were

updated, despite the fact that she was on the final stages of her expectancy.

6. The Claimant testified that upon proceeding on maternity leave, she received a letter from the Respondent at her house, on 31/07/2014, indicating that her employment had been terminated. She stated that her employment was terminated without following due process, as such, the termination was unlawful.

7. It was her testimony that she was issued with a warning letter for arriving late at work. She denied being negligent in her duties. During cross-examination, she testified that she does not recall being issued with the 2<sup>nd</sup> warning letter of 27/06/2012 or the 3<sup>rd</sup> warning letter of 11/03/2013.

8. She maintained that she filed tax returns on time. She denied that she was issued with money to pay for NSSF and contended that she advised the company to pay for NSSF. It was her testimony that she was not called by the Respondent to respond to the letter it had received from KRA and she maintained that her duties were limited to VAT, NSSF, NHIF and PAYE.

9. Upon cross-examination, she testified that she received one warning letter. It was her position that her employment was terminated for poor performance and not lateness.

10. The Respondent filed a Statement of Defence on 12/03/2015 denying the allegation that the Claimant was assigned duties from Aberdare Investments Limited. It is the Respondent's position that the Claimant should claim against the company for the work she did.

11. The Respondent contends that once she got a salary increment, the Claimant became careless, negligent and would work under constant supervision. It is the Respondent's position that the Claimant's work ethic was erratic and unprofessional. As a result, she was issued with the 1<sup>st</sup> warning letter on 11/05/2013. The Respondent denies receiving the Claimant's letter of 10/06/2014.

12. The Respondent further contends that the Claimant's termination was done lawfully and that the Claimant was paid all her dues. The Respondent states that the Claimant's certificate of service was prepared but she refused to clear with the Respondent to enable her collect the same.

13. John Njaga Wango, the Respondent's Management Director, testified as RW1. He adopted his witness filed on 7/11/2018 and Bundle of Documents filed on even date, as his evidence.

14. It was his testimony that the Claimant's employment was terminated due to her poor performance as she failed to make cheque payments for various statutory obligations, which occasioned the Respondent to incur penalties; and was absent from work. He gave an instance when the Respondent was penalized because the Claimant made tax payment to the wrong account. It was his testimony that the Claimant was given an opportunity to defend herself before the termination.

15. During cross-examination, he conceded that the warning letter did not make reference to the Claimant's poor performance. He also conceded that he had no evidence that the Claimant received the 2<sup>nd</sup> and 3<sup>rd</sup> warning letters.

16. He admitted that the last comments from KRA indicated that there were no tax arrears under that head and that there were no problems with VAT. On the issue of NSSF he conceded that he had no letter from NSSF complaining of late payments.

17. RW1 admitted that he did not have evidence to prove that he had discussed the problem of KRA with the Claimant. He admitted that the Claimant worked for the Respondent as well as Aberdare Investment Limited but contended that the Claimant was paid for the work done for the latter.

### **Submissions by the Parties**

18. In her submissions filed on 7/10/2019, the Claimant submits that her employment was unfairly terminated as she was not subjected to any disciplinary proceedings or informed of the reasons for termination. This was contrary to her contractual terms and the rules of natural justice and legitimate expectation.

19. The Claimant submits that she is entitled to payment in lieu of notice as the Respondent never issued her with any notice. She submits that she is entitled to compensation for discrimination as she was discriminated against on account of her pregnancy. She further submits that she is entitled to compensation for the work she did for Aberdare Investments Limited without remuneration.

20. To support her case, the Claimant has relied on the cases of **Pauline Wanjuru W vs. Kenya Medical Research Institute [2019] eKLR**, **Esther Nduati vs. Ofyze Limited T/A Harris Tavern [2019] eKLR**, **Mercy Gakii Nabea vs. Malindin Management Strategy Limited [2019] eKLR** and **Claudine Wanjiku Mboce vs. Exon Investments Limited & Another [2007] eKLR**.

21. In its submissions filed on 20/12/2019, the Respondent submits that the termination of the Claimant's employment was lawful as she was issued with several warnings as required by Section 45 (5) (e) of the Employment Act. That before the Claimant was dismissed, there was telephone communication inviting the Claimant to appear before management to explain the shortcomings on her performance but she refused to avail herself.

22. The Respondent submits that pursuant to section 44 of the Employment, the Respondent was only required to issue her with 1 months' notice or pay her salary in lieu of notice. However, the Respondent did not release the same to the Claimant as it was used to settle the loan she had of KShs. 30,000.00. It is the Respondent's submissions that the Claimant is not entitled to service pay as she was a member of NSSF.

23. It is the Respondent's submissions that the Claimant is not entitled to the pay for the 2 months maternity leave not taken as she was summarily dismissed before the same was due to her. Further, that the Claimant is not entitled leave pay as she had been paid the same.

24. The Respondent submits that the Claimant is not entitled to compensation for unlawful termination, as her termination was lawful. To support its case, the Respondent has relied on the cases of Hezborn Tonny Mashaka vs. The Watchdog Limited [2019] eKLR, George Okello Munyolo vs. Unilever Kenya Limited [2019] eKLR and Francis Nyongesa Kweyu vs. Eldoret Water and Sanitation Company Limited [2017] eKLR.

25. The Respondent argues that the case of Pauline Wanjuru W vs. Kenya Medical Research Institute [2019] eKLR as relied upon by the Claimant is distinguishable as the reason for the Claimant's termination was her failure to render proper accounts. Further, that the cases of Esther Nduati vs. Ofyze Limited T/A Harris Tavern [2019] eKLR, Mercy Gakii Nabea vs. Malindin Management Strategy Limited [2019] eKLR and Claudine Wanjiku Mboce vs. Exon Investments Limited & Another [2007] eKLR do not relate to the issues before this Court.

26. I have examined all the evidence and submissions of both Parties herein.

27. From the Claimant's evidence, she was terminated when she was on her maternity leave. The termination letter indicates that the Claimant was terminated for poor performance. The termination letter is dated 31.7.2014.

28. On 10/6/2014, the Claimant had written to Respondent applying for her maternity leave with effect from 15<sup>th</sup> June or 20<sup>th</sup> June 2014. She also submitted a report on her outstanding work.

29. It must have come as a shock for the Claimant to receive a termination letter while on her maternity leave with effect from 31/7/2014.

30. The Claimant was not given any opportunity to explain herself on issues raised in the termination letter. Infact there is no indication that the Claimant had any prior knowledge of the events complained off.

31. Section 41 of Employment Act 2007 states as follows:-

*1) "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.*

*2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".*

32. The reasons for the termination were never tested in any hearing. It is my finding that the termination was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states as follows:-

*2) "A termination of employment by an employer 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 employment was terminated in accordance with fair procedure".*

33. Coupled with the fact that the Claimant was terminated while serving her maternity leave, the Respondent's action was callous and for this reason I award Claimant:-

**1. a maximum of 12 months' salary as compensation for the unlawful and unfair termination = 12 x 25,000 = 300,000/=**

I also award Claimant:-

**2. service pay for 3 years =  $\frac{1}{2} \times 25,000 \times 3 = 37,500/=$**

**3. Leave for 2014 = 25,000/=**

**TOTAL = 337,500/=**

*4. Issuance of a certificate of service.*

*5. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in open Court this 29<sup>th</sup> day of January, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mumbo holding brief Ondabu for Respondent

Miss Wasike holding brief Kariuki for Claimant