



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO.68 OF 2016

(Before Hon. Justice Mathews N. Nduma)

JOAN ANYANGO ODERO.....CLAIMANT

VERSUS

JALARAM MATERNITY AND NURSING HOME.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit on 15th March 2016 seeking an order in the following terms:

- a. Reinstatement to work.
- b. In the alternative, 2months' salary for every year worked from 22/8/2012 to 12/12/2015.
- c. Payments of salary at the gazette minimum monthly wage pay for a period of 3 years.
- d. Arrear salary for January 2016.
- e. Leave allowance for 2 months.
- f. One month salary in lieu of notice.
- g. Interest and costs.

2. The claimant (**CW1**) testified that she is presently a house wife living at Oyugis. That she was employed by the Respondent on 23/8/2012 as a receptionist at a salary of Kshs. 9,885 per month. The claimant worked continuously until 23rd October 2015. **CW1** testified that she was pregnant and applied for maternity leave.

3. The claimant produced leave application form dated 23/10/2015 filled by hand by herself. The leave was to commence on 12/10/2015 to 22/12/2015 and the return date was 23/12/2015. The leave form was also duly filled and signed by the Matron in Charge.

4. **CW1** testified that she took leave for sixty (60) days and returned as scheduled on 23/12/2015. That upon return the claimant was informed by Mr. J. K. Paul that the respondent could not take her back as the claimant had not informed the respondent that she was going to conceive.

5. The claimant reported the dispute to the Ministry of Labour on 18/12/2015 and the Ministry wrote a letter to the respondent on the same date requesting the respondent to respond to the complaint within 7 days. The claimant later reported the dispute to an advocate, who wrote a letter of demand to the respondent dated 5/2/2016. The respondent did not respond to both letters.

6. **CW1** testified further that the respondent did not register her with NSSF and did not make contributions on her behalf. **CW1** stated that she was not paid house allowance and was underpaid the whole period she worked. That as at 12/10/2015 she was paid Kshs. 12,665 per month.

7. **CW1** produced pay slip for the month of December 2012 which shows the basic salary of Kshs. 9,885 without any statutory deductions and no house allowance. **CW1** testified that a receptionist was supposed to earn a minimum wage of Kshs. 16,872 at the time of termination. The claimant produced regulation of wages, general order for the period 2012 or 2015 to illustrate that she was being underpaid. The claimant prays for the reliefs set out in the statement of claim.

8. Under cross examination the claimant testified that she was not given letter of appointment. The claimant also testified that she applied for and was given 60 days maternity leave. CW1 stated that she had applied for leave on 12/10/2015 and that she had been advised to apply one day before she proceeded on maternity. CW1 insisted that the application was approved. That she went on leave and resumed on 23/12/2015.

9. CW1 stated that she was not even given a letter of termination and she was simply told upon return that she would not be taken back.

The claimant sought reinstatement to her previous position or in the alternative compensation and payment of terminal benefits.

DEFENCE

10. RW1 Wycliffe Midialo Omondi testified in defence of the case. RW1 adopted a witness statement dated 10/12/2018 as his evidence in chief. RW1 testified that CW1 had her employment terminated for going on maternity leave without notifying the respondent. RW1 said that the employer felt that CW1 had absconded duty and was relieved of her duty on 1/1/2016 for gross miss-conduct.

11. RW 1 insisted that the respondent was not aware that CW1 was proceeding on maternity leave. That the claimant ought to have notified the respondent three months before the date of delivery. That the claimant filled the maternity leave 12 days upon delivery. CW1 came back on 12/10/2015 to apply for leave. RW1 added that the claimant was paid Kshs. 12,650 per month and was paid salary up to December 2015.

12. RW1 stated that the termination of employment was justified. RW1 said he was the accounts clerk of the respondent. That the leave application forms were signed by the matron and a Director.

13. RW1 stated that no disciplinary hearing was conducted. That CW1 was called and asked where she was and she explained that she was on maternity leave. RW1 stated that he was not aware how the termination was done. RW1 added that CW1 had not been granted leave.

DETERMINATION

14. The issues for determination are:-

(a) Whether the termination of employment of the claimant was lawful and fair.

(b) Whether the claimant is entitled to the reliefs sought.

15. In answer to issue (a) above the court has carefully considered the testimony of CW1 and that of RW1 and has in particular considered documentary evidence presented by the claimant and has come to the conclusion that the claimant filled a leave application form on 23/10/2015 having gone to labour in the week commencing 12/10/2015.

16. The claimant actually came back after giving birth to fill the maternity leave form. The leave was backdated to 12/10/2015 and was upto 22/12/2015. The leave form and the application was approved by the Matron in Charge by completing the section reserved for the department head and appending her signature.

17. The matron was not called by the respondent to refute the fact that she approved maternity leave for the claimant for a period of sixty days. Indeed RW1 told the court that leave is usually approved by the Matron or the Director. The leave form has only one position for signature by a representative of the employer and it is the court's finding that it was sufficient for the matron to approve the maternity leave for the claimant.

18. Indeed the claimant received her salary while she was away on maternity leave. It was dishonest on the part of RW1 to tell the Court that the claimant had no authority to go on maternity leave and that the Respondent was not made aware that the Claimant was pregnant.

19. RW1 admitted that no disciplinary hearing was held before the employment of the claimant was verbally terminated by one J. K. Paul, when the claimant resumed duty on 23/12/2015. Indeed that termination was a summary dismissal because the claimant received no notice of termination, no notice to show cause and no hearing prior to the termination. The claimant was not given a letter of termination nor did she get a certificate of service.

20. The action by the respondent violated Sections 36, 41, 43 and 45 and 46 of the Employment Act, 2007 and amounted to an unlawful and unfair summary dismissal of the Claimant for not valid reason and without following a fair procedure.

21. Accordingly, the Claimant is entitled to compensation in terms of Section 43 (1) (c) and (4) of the Employment Act.

In this respect the Claimant had served diligently and with no adverse record as a receptionist of the respondent which was ironically a Nursing and Maternity home. The respondent was better placed to understand requirements of an expectant mother including occurrence of early and unexpected labour pains that may necessitate the kind of steps taken by the Claimant of filling the leave form after she had already given birth.

22. The Claimant had worked for a period of three years. The claimant wished to continue working for the respondent and indeed prayed for reinstatement to her job because their dismissal was for no valid reason.

23. It is an aggravating factor for the respondent to victimize the claimant on grounds of pregnancy and unavoidable maternity leave. The action by the respondent was most inconsiderate and is not expected of a responsible employer in the medical industry.

24. The claimant was not paid any terminal benefits. The claimant was underpaid for the period of three years in terms of the general wages order for the period 2012 to 2015. The claimant was not compensated for the job loss. The claimant did not contribute to the summary dismissal. The claimant had not found alternative employment.

25. The respondent is a small to medium Nursing and Maternity Home and it is not a suitable environment for the court to reinstate the claimant especially after the period of over four (4) years from the time the dismissal took place.

26. The Claimant was not registered with NSSF and NHIF and the respondent did not contribute to these statutory funds nor did it have an alternative pension scheme for the claimant. The claimant suffered loss and damage.

This case is similar in many respects to the case of *VMC – VS- CUEA NAIROBI ELRC CUASE NO. 1161 OF 2010 (2013) eKLR* in which the court awarded the claimant general damages in the sum of Kshs. 5,000,000 for unlawful and unfair dismissal of the claimant who was a receptionist. The Claimant had been victimized on grounds of pregnancy and HIV – AIDS.

27. In the present case the claimant did not establish discrimination since it was not pleaded. However, the effect of the present dismissal of the claimant borders on victimization on grounds of pregnancy and taking of maternity leave. The court does not take the conduct by the respondent kindly.

28. Considering all the factors above, the Court awards the claimant the equivalent of ten (10) months' salary in compensation for the unlawful and unfair termination of the employment of the claimant.

Issue two.

29. The second issue for determination is whether the claimant has proved she was underpaid for the period of three years, she served the respondent. It is not in dispute that the claimant worked as receptionist and earned Kshs. 9,885 in the year 2012 when she was employed. By the time the claimant left employment her salary had risen to Kshs. 12,665. The salary of receptionist as at July 2012 was 13,214.60/- as at July 2013 was Kshs 15,060 and as at May 2015 was Kshs. 16,872.

30. The claimant has proved on a balance of probabilities that she did not receive the mandatory minimum wage of a receptionist from the respondent from the date of her employment up to the time of termination. The court awards the claimant the difference in salary for the entire three (3) years period of her employment.

31. The Claimant was entitled and was not paid salary in lieu of notice in the sum of Kshs. 16,872 being the equivalent of one month salary she was entitled to as at the time of termination.

32. The claimant was also not under any pension scheme and in terms of section 35 (5) of the Employment Act, is entitled to at least 15 days salary for each completed year of service being termination gratuity. The Court awards her accordingly.

33. In the final analysis Judgment is entered in favour of the claimant against the respondent as follows:-

a. Compensation (16,872 X10) = Kshs. 168,720

b. Kshs. 16,872 in lieu of one month notice.

c. Under payments for three years being the difference of the gazette minimum wage for a receptionist and the salary received by the claimant in the year 2012 to 2015. The amount to be computed and filed in Court by the claimant for approval by the Court.

d. Service gratuity calculated at 15 days salary for each completed year of service in the sum of Ksh. 25,308.

e. Interest at Court's rates from date of Judgment in respect of (a) above and from date of filing suit in respect of (b), (c) and (d) above till payment in full.

f. Costs of the suit.

34. For the avoidance of doubt, the claims for payment of leave allowance for 2 months, salary for January 2016 and maternity leave for 1 month have not been proved and are dismissed.

Judgment Dated, Signed and delivered at Nairobi this 28th day of May, 2020

Mathews N. Nduma

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 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma,

Judge

Appearances

M/s Otieno for Claimant

M. C. Ouma for Respondent

Chrispo – Court Clerk