



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 523 OF 2016**

**MARSHA LULU ACHIENG**

**CLAIMANT**

**v**

**M-KOPA KENYA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Marsha Lulu Ochieng (Claimant) was offered employment as a Business Analyst Lead through a letter dated 13 October 2015 by M-Kopa Kenya Ltd (Respondent). The contract was to run for 1-year with probation of 3-months.
2. The Respondent evaluated the Claimant's performance for the year 2015 and awarded her a bonus for the remarkable effort.
3. Nevertheless, on 1 February 2016, the Respondent wrote to the Claimant to notify her that her probation had been extended for 1-month as a consequence of her requesting on 19 January 2016 to be moved from the Data department to another department.
4. On 1 March 2016, the Respondent extended the Claimant's probation for a further 1-month to enable her to *improve on the ability to take directions and feedback from the management and improved judgment when airing issues in forums that include junior staff*.
5. However, on 2 March 2016, the Chief Credit Officer wrote to the Claimant to inform her that since her probation had come to an end, she would not be confirmed in the position of Business Analytics Lead.
6. The Claimant was aggrieved and on 4 April 2016 instituted these legal proceedings against the Respondent alleging unfair termination of employment, violation of constitutional rights and breach of contract.
7. The Respondent filed a *Response* on 20 May 2016 and list of witnesses and documents on 16 July 2018.
8. The Claimant filed her List of Issues on 6 November 2019 and hearing proceeded on 30 September 2019 in the absence of the Respondent.
9. The Respondent successfully moved the Court to re-open the hearing and its case was taken on 6 October 2020.
10. The Claimant filed her submissions on 12 October 2020 while the Respondent filed its submissions on 11 November 2020.
11. The Court has considered the pleadings, evidence and submissions and adopts the Issues as proposed by the Claimant.

**Unfair termination of employment**

12. In challenging the termination of her contract and/or refusal to confirm her, the Claimant asserted that the real reason for the non-confirmation and termination of employment was her pregnancy.
13. According to the Claimant, when around December 2015 she informed her supervisor that she was expecting a baby, the supervisor did not take kindly the information and she (supervisor) informed her that it was too soon after being employed to get pregnant.
14. The Claimant testified that the remarks were followed with a letter extending her probation on 1 February 2016 and the advertisement of her position on the same day, and a further extension on 1 March 2016 before the notification of non-renewal on 2 March 2016.
15. The failure to confirm her, the Claimant contended amounted to *constructive dismissal* and was discriminative and was patently unfair.

16. For the Respondent, the witness presented before Court from the Human Resources department stated that the Claimant's contract provided for probation and that before end of probation, the Claimant requested to be transferred to another department, and because of the change of roles, it was found necessary to extend the probation.

17. The witness also testified that probationary evaluation of the Claimant was carried out around 8 February 2016 and some soft skills gaps were identified and that discussions were held with the Claimant on the gaps on 29 February 2016 and 1 March 2016.

18. As a result of the discussions, it was agreed to extend, again, the Claimant's contract for 6-weeks up to 15 April 2016.

19. However, the Claimant declined to sign the letter extending the probation thus leading to the decision on 2 March 2016 not to confirm her.

20. The witness denied that the Claimant was discriminated against.

21. It is not in dispute that the Claimant was under probation and the probation was to expire on 1 February 2016.

22. It is also not disputed that on 18 February 2016, the Respondent recognised and congratulated the Claimant for her performance for the period ending December 2015. She was even paid a bonus.

23. It cannot be then that the Claimant's performance was wanting. Could it then be that there was some tension between the Claimant and her colleagues?

24. There is evidence that there were attempts to change the Claimant's designation but she rejected the attempt. At around the same time, the Claimant requested to move to another department and on that basis, the Respondent extended the probation for 1-month. At the same time, the Respondent advertised the Claimant's position as Lead Analyst.

25. In the view of the Court, the Respondent cannot be faulted for the extension of probation and/or advertisement, for the Claimant was assuming different responsibilities.

26. After the end of the 1-month probation under the new role, the Claimant and the Respondent held discussions and certain gaps were identified in respect of the Claimant's soft skills.

27. The Respondent decided to extend the probation by 6-weeks to enable the Claimant work on the identified gaps but the Claimant declined to accept the extended probation, leading to the decision not to confirm her.

28. The Claimant having opted not to accept the further probation, the Court finds that this was not a case of unfair termination of employment or *constructive dismissal*.

29. If at all the Claimant wanted to assert *constructive dismissal*, she did not present enough evidence to demonstrate that the Respondent had made the work environment so hostile as to entitle her to leave and assert *constructive dismissal*.

### **Pay in lieu of notice**

30. The Respondent had offered the Claimant the equivalent of 7-days' pay in lieu of notice because she was still on probation.

31. The Claimant on her part sought the equivalent of 1-month salary in lieu of notice. She did not prove the basis of the 1-month notice.

32. The Court would therefore allow the equivalent of 7-days salary in lieu of notice as was offered by the Respondent.

### **Compensation**

33. With the conclusion that this was not a case of unfair termination of employment, the Court will not award compensation.

### **Discrimination**

34. The Supreme Court of Kenya in *Samson Gwer & 5 Ors v Kenya Medical Research Institute & 3 Ors* (2020) eKLR, held that a litigant alleging discrimination had the obligation at the first instance of laying substantial material before the Court to discharge the evidential burden to demonstrate discrimination before the burden shifts to the other side to prove to the contrary.

35. The Claimant contended that the real reason for the non-confirmation was as a result of her pregnancy, and further asserted that she was discriminated on the basis of her pregnancy.

36. The Claimant placed the discriminatory conduct at the doorstep of her immediate supervisor, Mary Wanjiku who told her it was too soon to get pregnant after joining the Respondent. She testified that because of the pregnancy she would only be confirmed in a junior position.

37. The supervisor was not called to rebut the testimony of the Claimant but the Respondent's witness referred to extracts of skype conversations involving the Claimant and other employees of the Respondent to show that there was a cordial relationship between the

Claimant and the supervisor. Among the participants in the conversations was the said supervisor.

38. The Claimant admitted that the tone of the conversations was cordial. The supervisor who the Claimant accused of discrimination was amongst the employees who visited the Claimant during her pregnancy.

39. On the state of the record and in consideration of the fact that the separation was as a result of the Claimant declining to sign a further extension of probation, the Court finds that the Claimant did not lay a sufficient evidential foundation to the allegations of discrimination.

#### **Breach of contract**

40. The Claimant alleged breach of contract in that she was entitled to but did not get maternity leave.

41. The Claimant, however, conceded that she did not apply for maternity leave. She gave birth in April 2016, after separation.

42. In the circumstances, the Court finds no breach of contract with respect to maternity leave.

#### **Lost income**

43. The Claimant sought Kshs 1,520,000/- being the remuneration she would have earned had she served the full contract.

44. The Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC 21 had this to say of this type of claim **the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.**

45. This Court agrees.

#### **Unpaid leave**

46. Each employee is entitled to annual leave. The Claimant prayed for Kshs 55,417/- being accrued 7 days leave.

47. The Respondent had offered to pay the Claimant on account of outstanding leave but stated the Claimant declined.

48. The Claimant is entitled to the outstanding leave.

#### **Outstanding salary**

49. The Respondent offered the Claimant the earned wages for March 2016. She is entitled to the same as of right.

#### **Certificate of Service**

50. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

#### **Conclusion and Orders**

51. From the foregoing, the Court finds and declares that the Claimant's contract was not unfairly terminated nor were her constitutional rights violated.

52. The Court finds that the Claimant is entitled to and is awarded

(a) Salary in lieu of notice

(b) Earned wages

(c) Accrued leave Kshs 55,417/-

TOTAL Kshs

53. Respondent to issue a certificate of service within 21 days.

54. The Claimant has succeeded partially. Each party to bear their own costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on 25<sup>th</sup> this day of November 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Otieno instructed by Otieno Ogola & Co. Advocates

For Respondent Mr. Muriithi instructed by Kimani & Muriithi Associates Advocates

Court Assistant Lindsey/Judy Maina