



**REPUBLIC OF KENYA**

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

**CAUSE NO. 883 OF 2015**

***(Before D. K. N. Marete)***

**ESTHER NDUATI.....CLAIMANT**

**VERSUS**

**OFYZE LIMITED T/A HARRIS TAVERN.....RESPONDENT**

**JUDGEMENT**

This matter was originated by a Statement of Claim dated 22nd May, 2015. The issues in dispute are numerous and form the core to the claim. These are;

3. *Whether the Respondent violated section 27(5) of the Constitution which provides for non-discrimination against a person on any grounds including pregnancy.*
4. *Whether the Respondent infringed upon the Claimant's right under Section 29(2) of the Employment Act which provides for the return to employment of a female employee after maternity leave provided for in this Section.*
5. *Whether the Respondent disregarded Section 29(7) of the Employment Act providing for right for a female employee to have annual leave.*
6. *Whether the Respondent unfairly terminated the Claimant's contract to section 45 of the Employment Act.*
7. *Whether the Respondent violated the Claimant's right to fair labour practices under Article 41(1) of the Constitution.*
8. *Whether the Respondent violated the Claimant's right to fair administrative action, thereby contravening Article 47(1) of the Constitution.*
9. *Whether the Respondent infringed upon the Claimant's right to legitimate expectation thereby contravening Article 47(1) of the Constitution.*

The respondent in a Respondent's Statement of Defence and Counter-Claim dated 4th August, 2015 denies the claim and prays the same be dismissed with costs and interest.

The claimant's case is that she was employed by the respondent on a permanent basis as an Accountant at a monthly salary of Kshs.35,000.00. This was later increased to Kshs.45,000.00. She was never provided or paid housing allowance as is required of the law.

The claimant's further case is that she has professional qualifications of CPA-K and is also pursuing Bachelor of Commerce Degree at Masinde Muliro University.

The claimant's performance was exceptional, diligent and to the satisfaction of the respondent who never raised any complaints in regard to her work.

The complainant's other case is that on 14th September, 2014 she requested for maternity leave from 15th September, 2014 to 31st December, 2014. She thereon went out to dispense all her duties pertinent to the audits for the year 2013/2014 and by the time of taking leave. She had completed all her tasks for the year. The parties had also pactd that she spends her annual leave for 2014 in January, 2015 and therefore would resume work on 1st February, 2015.

The claimant's further case is that while on leave, she was not paid her salaries for the months of October, November and December and is yet to receive her pay for the annual leave inclusive of other employment dues.

The claimant's other case is that she pursued a follow up of payment for the other unpaid and untaken leave days but the respondent was unresponsive and unwilling to discuss these or other issues of her employment. She therefore deduced that she had been terminated from employment. This was self-evidently unfair, unprocedural without notice or a valid reason. She further expresses her case in the following averments;

21. *The Respondent's have further in terminating the employment of the Claimant discriminated against her on account of gender and pregnancy, and have breach the inalienable rights of the Claimant as a female (and pregnant) worker.*

22. *The challenge of unfair termination has been aggravated since the Claimant was terminated when she was heavily pregnant and only learned of the termination when she had just had a newborn baby. She has since not been able to procure employment and continues to suffer for she has no source of a livelihood.*

23. *The Claimant avers that the Respondent has infringed upon her rights in the following ways;*

a) *The Respondent violated Section 27(5) of the Constitution which provides for non-discrimination against a person on any grounds including pregnancy.*

b) *The Respondent infringed upon the Claimant's right under Section 29(2) of the Employment Act which provides for the return to employment of a female employee after maternity leave as provided for in this Section.*

c) *The Respondent disregarded Section 29(7) of the Employment Act providing for the right for a female employee to have annual leave.*

d) *The Respondent unfairly terminated the Claimant's contract contrary to Section 45 of the Employment Act. There was no fair and valid reason for termination. Indeed, no reasons whatsoever were given for the termination.*

e) *The Respondent violated the Claimant's right to fair labour practices under Article 41 (1) of the Constitution.*

f) *The Respondent violated the Claimant's right to fair administrative action, thereby contravening Article 47 (1) of the Constitution and*

g) *The Respondent infringed upon the Claimant's right to legitimate expectation thereby contravening Article 47(1) of the Constitution.*

24. *The claimant further avers that the Respondent has failed, refused and/or willfully neglected to pay all outstanding dues that the Claimant was entitled to for the months for which she was on leave.*

<b><u>Particulars of Unpaid Dues</u></b>	<b><u>Total</u></b>
i) Unpaid salary (3 months)	Kshs.135,000.00
ii) Annual Leave Pay	Kshs.45,000.00
iii) PAYE (Deducted from salary but unremitted at Kshs.7,345/- per months)	Kshs.51,415.00
iv) Pay in lieu of Notice	Kshs.45,000.00
v) Service pay for three (3) years	Kshs.67,500.00
vi) House allowance (15% per month x 3 x 12)	Kshs.243,000.00
vii) General Damages for breach of contract and unfair/unlawful termination (Kshs.45,000 x 12 Months)	Kshs.540,000.00
viii) Exemplary Damages for discrimination (Kshs.45,000 x 12 Months)	Kshs.540,000.00

**TOTAL**

**Kshs.1,666,915.00**

She claims and prays thus;

i) Unpaid salary (3 Months)	Kshs.135,000.00
ii) Annual Leave Pay	Kshs. 45,000.00
iii) PAYE (Deducted from salary but unremitted at Kshs.7,345/- per months)	Kshs.51,415.00
iv) Pay in lieu of Notice	Kshs.45,000.00
v) Service pay for three (3) years	Kshs.67,500.00
vi) House allowance (15% per month x 3 x 12)	Kshs.243,000.00
vii) General Damages for breach of contract and unfair/unlawful termination (Kshs.45,000 x 12 Months)	Kshs.540,000.00
viii) Exemplary Damages for discrimination (Kshs.45,000 x 12 Months)	Kshs.540,000.00
<b>TOTAL</b>	<b>Kshs.1,666,915.00</b>

ix. Costs of the suit;

x. Certificate of service

xi. Interest on (i) to (ix) above and

xii. Any other relief that this court deems fit

The respondent's case is a denial of the claim.

It is her case that the claimant was never employed on a permanent basis but had been offered a job on an annual renewable contract at the option of the respondent and this was renewed annually by implication.

The respondent's further case and controversial of paragraph 15 is as follows;

*7. The contents of paragraph 15 are denied as the claimant sought for leave which regardless of the period being the busiest of seasons was granted so the respondent had to outsource services of an accounts assistant to dispense off the much required audit and make good the balancing of books from the period of her leave till she was expected to balancing of books from the period of her leave till she was expected to report back on or about 1<sup>st</sup> January, 2015, a service the respondent paid for.*

The respondent's further case is a denial of untaken leave or even unpaid salaries during her maternity leave and further that on expiry of the maternity leave, the claimant did not report back to work or even communicate thus occasioning abscondment from duty on her part. The claim of termination is therefore a farce.

The respondent's case further comes out as follows;

*18. Although the employment Act, under S.43, 44 (4) and by extension s. 45 to 46 provides for grounds of among others summary dismissal which among them include absenteeism, insubordination and negligence which the claimant was but only being internally investigated for; at the time she chose to abscond her duties and abandon her work station, there was no intuition or intention of terminating the claimant employment before the procedure mechanism had been fully complied with hence no record of letter of termination nor any reference of such was made to the claimant.*

*19. The respondent company had just started investigation in the claimant's conduct which led to loses in the company when she abandoned her work and never came back to work but only resorted to filing a suit for termination.*

20. The termination of the claimant as she puts it does not constitute termination per se as defined by S.45 of the employment Act since the Respondent has never terminated the claimant's employment and has no record thereof, but the respondent had just started its internal investigations on the losses accrued under the watchful eyes and department of the claimant (accounts and audit) when the claimant chose to abandon, abscond and absent herself from her work station immediately her maternity leave expired on 31<sup>st</sup> December 2014; even before she could collect or pay herself her salary payment for the past 3 months which salary had been held in lien pending the Claimant's explanation as to irregularities discovered after the said investigations were conducted.

The respondent's further case is a counter claim as follows;

25. Before the claimant went on maternity leave and during her absence and work abandonment the respondent company suffered financial loss causing the Respondent Company to record a profit margin of 20% instead of the expected profit margin of 30% as indicated in the audit report. This arose due to the Respondent's failure to maintain proper books of accounts. Her negligence further caused the claimant company to incur fines to KRA bringing the company's losses as a result of her said actions to stand at least at a whopping Kshs.2,000,000.

29. The counter claim now demands the salary in lieu of notice as below: One month's salary lieu of notice (Kshs.45,000 x 1) =Kshs.45,00/=

It is the respondent's case that the loss occasioned to herself was by the negligence of the claimant and a consequence of her misconduct of absconding work.

She prays as follows;

- a) The claimant's suit be dismissed with costs together with interest thereon at such rate as the court may determine.
- b) Salary in lieu of notice of Kshs.45,000/=
- c) General damages.
- d) Judgment be entered in favor of the respondent for the sum of Kshs.1,963,320/=
- e) Interest on (a), (b) and (c) above the prevailing commercial rates; and
- f) Costs of the suit and the counter claim together with interest thereon for such period and at such rates as the Honorable court may deem appropriate.

The claimant's case in reply to the counter claim is as follows;

- She denies the contents of the counter-claim and specifically paragraph 24 as she did not willfully or intentionally neglect, abandon her work station or any duties that could cause loss of business and financial loss to the company.
- Performance was diligent with no eyebrows from the respondent.
- All her leave, maternity and annual was agreed on inter partes.
- She did not terminate her services and was always keen to resume her work and only consulted on her maternity and annual leave but was instead terminated from employment unfairly, unprocedurally without notice or valid reason.
- Counter – claims 28 and 29 are denied. She did not terminate herself. On absconding duty but was unfairly terminated on account of gender and pregnancy thus a breach of her inalienable rights as a female and pregnant worker.
- She is not owing to the respondent in terms of general damages or salary in lieu of notice.

The issues for determination therefore are

1. Whether the claimant was terminated from employment for reasons of taking up her maternity leave?
2. Whether the termination of the employment of the claimant by the respondent was discriminative, wrongful, unfair, unprocedural and unlawful?
3. Whether the respondent is entitled to the counter claim as set out?
4. Whether the claimant is entitled to the relief sought?
5. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant was terminated from employment for reasons of taking up her maternity leave. The claimant in his written submissions dated 29th October, 2018 reiterates her case and submits that she was not paid her salaries for the months of October, November and December 2014 in contravention to section 29 (1) of the Employment Act, 2007 which provides for three months maternity leave for female employees as follows;

*“29. (1) A female employee shall be entitled to three months maternity leave with full pay.”*

It is the claimant’s further submission that she had a right to return to work but this was rebuffed by the respondent incessant refusal to engage the claimant and discuss a return to work formulae. This amounted to constructive termination of her employment and amounted to discrimination on grounds of sex and pregnancy.

The claimant extends this element of discrimination to her denial of annual leave with pay in contravention of section 28 (1) of the Employment Act, 2007 which provides as follows;

*“28. (1) An employee shall be entitled – (a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;”*

Foremost, the claimant submits that the actions of the respondent amounted to discrimination and a contravention of Article 27 (4) and (5) of the Constitution of Kenya, 2010 which provides as follows;

*“(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status...”*

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”*

This was also an affront to the celebrated Article 41(1) and 47(1) of the said Constitution which entitles all person to fair labour practices and fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The claimant in further support of her case sought to rely on the authority of **Esther Wanjiru Magu vs. Steel plus Limited** where in similar circumstances, the court observed as follows;

*“...Esther Wanjiru Magu lost her job on the basis of her pregnancy. She was barred from resumption of duty because she was an economic burden to the Employer. She was denied her salary during pregnancy because it was thought she was not productive while on maternity leave. She merits damages for pregnancy discrimination, as well as compensation for the economic injury sustained in the unfair termination.”*

The respondent in her written submission dated 5th November, 2018 submits a case of no termination from employment. It is her further submission that the claimant failed to report back to work on expiry of maternity and annual leave which amounted to absconding duty with effect from 1st January, 2015. Besides, she ignored the respondent’s calls for them to sit down together so that she could explain the discrepancies detected in the accounting.

The respondent submits a case of voluntary negation and abscondment from duty and relies on the authority of **Hardley Mulanda & 53 Others vs Giefcon Limited (2016) eKLR** where the court observed as follows;

*“Desertion vs. Dismissal*

*8. The claimants contend that it is the respondent who terminated their employment on assumption that the claimants had transferred to work for Toyo directly. On the other hand the respondent contends that it is the claimants who deserted her employment without notice and went to seek for greener pastures at Toyo. The court finds that the claimant’s contracts were terminated on diverse dates but no evidence adduced by them prove that they were terminated by the respondent.*

*9. Under section 47 (5) of the Employment Act the burden of proof lies with the employee who alleges that he was wrongfully dismissed. The respondent’s case that it is the claimants who deserted her for greener pastures is corroborated by the proceeding before the Labour Officer where some workers and their union were agitating for better terms and conditions of service. Consequently the answer to the first issue for determination is that it is the claimants who deserted their employment with the respondent in search for greener pastures. That the said desertion was without prior notice to the respondent.”*

The respondent further discounts a case of termination on grounds of discrimination based on pregnancy by relying on the authority of **GMV vs BANK OF AFRICA KENYA LIMITED [2013] eKLR** where the court observed as follows;

*“Courts have stated that the employee need to:-*

- *Establish she belongs to a protected class.*
- *Demonstrates she qualifies 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 the 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.”

The respondent’s case and submission is that the claimant has not adequately proved a case of discrimination or termination of employment and that in all, she never reported back to the respondent’s premises or office for a confirmation of her employment status. She instead acted on the assumption that she had been unprocedurally terminated from employment.

This is a matter of your case against mine. The claimant posts a case of discrimination and termination of employment on grounds of sex and pregnancy which case is denied by the respondent. The law act sections 9, 10 and 74 of the Employment Act, 2007 enlists the employer with the duty of being the custodian of records pertaining to employment. In the event that there are issues in dispute relating to the employment status of an employee, the law mandates the employer to avail records establishing the disputed or confrontational terms of employment.

In the present situation, the claimant posits a case of discrimination and termination of her employment by the respondent. The respondent, instead of adducing evidence to the contrary merely comes out in denial of these allegations of dismissal. What action did the respondent take when, as alleged and submitted, the claimant absconded duty and refused to co-operate on the issue of disorderly accounts by the claimant? The respondent was duty bound to document these events and also subject the claimant to disciplinary action as is required of the law. She did not, or rather, she has not adduced any evidence to this extent. This leaves her case in disarray. Unproven.

Section 47 (5) of the Employment Act, 2007 is not a straight jacket provision against employees on issues of burden of proof of unlawful termination. This burden of proof shifts systematically onto both the employee and employer depending on the circumstances of the parties stated case. Where an employee puts in a case of unlawful termination of employment on a balance of probabilities, the law binds and mandates the employer to rebut the issue of unlawful termination by proving that after all, the termination of employment was lawful in the circumstances. This is the balancing aspect of this provision of the law and must be clearly appreciated by all parties to an employment contract.

The circumstances of this case bring out a case of unlawful, constructive termination of the employment of the claimant by the respondent. This is because the respondent has in all ways failed to controvert and contradict the claimant’s case by way of evidence. On a balance of probabilities and preponderance of evidence, the claimant’s case overwhelms that of the respondent. I therefore find a case of unlawful and discriminative termination of the employment of the claimant by the respondent. This was based on the sex and pregnancy of the claimant. And this answers the 1st and 2nd issue for determination.

The 2nd issue for determination is whether the termination of the employment of the claimant by the respondent was discriminative, wrongful, unfair, unprocedural and unlawful. This issue is variously entwined with the 1st issue for determination. I enjoin them as such and answer this positively. As observed above in issue No. 1 above, the termination of employment of the claimant by the respondent carried all the ingredients in this issue for determination.

The 3rd issue for determination is whether the respondent is entitled to the counter claim as set out. This claim by the respondent is abstract. It remains a mere allegation and is not in any way established in evidence. Again, on a finding in favour of the claimant in issues No.1 and 2 above, the counter claim is rendered redundant or even irrelevant. It fails *in toto*. It is therefore disallowed.

The 4th issue for determination is whether the claimant is entitled to the relief sought. She is. Having won a case discriminative and unlawful termination of employment, she becomes entitle to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. One (1) months salary in lieu of notice.....Kshs.45,000.00

ii. Six (6) months salary as compensation for unlawful

termination of employment Kshs.45,000.00 x 6 =.....Kshs.270,000.00

iii. Three (3) months unpaid salary

for October, November and December 2014.....Kshs.135,000.00

iv. One (1) months pay in lieu of untaken leave.....Kshs.45,000.00

v. General damages for discrimination.....Kshs.200,000.00

**Total of claim.....Kshs.695,000.00**

vi. The costs of this claim shall be borne by the respondent

**Dated and signed this 14th day of February 2019.**

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 22nd day of February 2019.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Munyaka instructed by Munyaka & Company Advocates for the claimant.
2. Mr. Njoroge holding brief for Miya instructed by Kwengu & Company Advocates for the respondent.