



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 40 OF 2018

MERCY GAKII NABEA.....CLAIMANT

VS

MALINDI MANAGEMENT STRATEGY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim filed in court on 9th April 2018, Mercy Gakii Nabea has sued her former employer, Malindi Management Strategy Limited. The Respondent filed a Statement of Response on 23rd July 2018.
2. At the trial, the Claimant testified on her own behalf and the Respondent called its General Manager, Michael Gichohi.

The Claimant's Case

3. The Claimant was employed by the Respondent on 1st December 2007 in the position of security guard. On 12th December 2017, she applied for maternity leave which was granted. On 16th January 2018, while still on maternity leave, she received a letter terminating her employment on account of redundancy. She was offered terminal dues in the sum of Kshs. 65,159 which she declined to receive.
4. At the time of termination, the Claimant earned a monthly salary of Kshs. 13,031. She states that she was being underpaid.
5. The Claimant avers that the termination of her employment was unlawful and unfair. She therefore claims the following:

- a) 1 month's salary in lieu of notice.....Kshs. 15,375
- b) 3 months' unpaid maternity leave.....46,125
- c) Severance pay for 11 years of service.....95,572
- d) Underpayment from 1st May 2017 to 28th February 2018.....23,440
- e) Compensation for unfair termination.....184,500
- f) Damages for loss of employment.....184,500
- g) Costs plus interest

The Respondent's Case

6. In its Statement of Response dated 16th July 2018 and filed in court on 23rd July 2018, the Respondent admits that the Claimant was its employee. The Respondent further concedes that the Claimant was issued with a termination letter on account of redundancy but denies that the termination was in breach of the Employment Act, 2007.
7. The Respondent states that the Claimant was offered her terminal dues which she declined. The Respondent adds that although the Claimant was declared redundant while on maternity leave, she was paid for the three (3) months she would have been on such leave and was

further given two months' notice from 16th January 2018 to 16th March 2018. She was also paid her severance pay.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

9. On 16th January 2018, the Respondent wrote to the Claimant as follows:

“Dear Miss Mercy,

REF: TERMINATION ON REDUNDANCY MERIT

This letter is to inform you of the termination of your employment with Malindi Management Strategy Limited with effect from 16th January 2018. This due to reasons we clearly explained to you. We held a Management meeting on 16th January 2018 and decided we cannot afford your services anymore.

We shall therefore terminate your services on account of redundancy and pay you in accordance to the Employment Act section 40(b) Labour laws 2007 and the contract we have with you.

Your final dues have been calculated as follows:

- 1. Serving you with Two months notice (from 16th Jan 2018 – 16th March 2018).*
- 2. Severance pay entitlement, 15 days for each completed year of service and you have served 8 years hence entitled to 120 days.*
- 3. Less any statutory deductions and advance owing incase any.*

Please read this letter carefully and if there are any claims(s) raise it up prior to final dues computation. Meanwhile we thank you so much for the services you rendered to this company and wish you all the best in your future endeavours.

With kind regards

(Signed)

Robert Muthama

Human Resource Officer

Signed

Michael Gichohi

General Manager”

10. From this letter, it is evident that the Claimant's employment was terminated on the ground of redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“ the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

11. The law recognizes redundancy as a legitimate ground for termination of employment. It is however not a *carte blanche* in the hands of the employer. An employer relying on this ground must go through the rigours of Section 40(1) of the Employment Act.

12. The reason for this is this; by definition, redundancy bears two significant factors; first, it is undertaken at the instance of the employer and second, the conduct of the employee is not in issue (see *Jane I Khalechi v Oxford University Press E.A. Ltd [2013] eKLR*). A heavy responsibility is therefore placed on the employer to secure the rights of the affected employee and ensure that the redundancy exercise is undertaken fairly and objectively.

13. In this regard, Section 40(1) of the Employment Act provides as follows:

40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

14. The first two conditions under Section 40(1) have to do with notice to the affected employee, their trade union (where one exists) and the local Labour Officer. It has now been firmly settled by the Court of Appeal in the well known cases of **Thomas De La Rue v David Opondo Omutelelma [2013] eKLR** and **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR** that in every redundancy situation, there are two separate and distinct notices, of not less than a month each. The first is a general notice to employees within the targeted establishment, the relevant trade union and the Labour Officer; the second notice is a termination notice addressed to each departing employee individually.

15. The third condition deals with the redundancy selection criteria, including seniority in time, skill, ability and reliability of each employee within the affected establishment. The last four conditions set out the statutory benefits to be paid to an employee declared redundant.

16. The Claimant states and the Respondent admits that she was issued with a letter terminating her employment on account of redundancy while on maternity leave. Apart from the termination letter dated 16th January 2018, there was no evidence of any prior redundancy notice to the Claimant.

17. Moreover, the letter of termination contemplates that the Claimant would serve notice while on maternity leave. The Court found no legal basis for this proposition which evidently flies in the face of the clear provisions of the Employment Act, which provides for maternity leave and notice period as separate and distinct rights. The Respondent's action also denied the Claimant her right to resume duty after maternity leave, contrary to Section 29(2) of the Employment Act and ILO Maternity Protection Convention Number 183 [2000].

18. The Respondent states that a number of other employees were declared redundant alongside the Claimant. This averment was however not supported by any documentary evidence and the Court attached no value to it. More significantly, the Respondent did not bother to lay before the Court the redundancy selection criteria employed in this case.

19. The Respondent's General Manager, Michael Gichohi told the Court that an appraisal of the Claimant's performance conducted by an evaluation committee of five managers had returned a report of poor performance, particularly in the year 2017. No appraisal report was tabled before the Court and there was no evidence that the Claimant was a participant in the appraisal of her performance.

20. In **Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR** this Court held that an appraisal of the performance of an employee must of necessity involve the active participation of the employee. Further, in **Kenya Science Research International Technical and Allied Workers Union (KSRIWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010)** my brother, **Rika J** held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve.

21. It was therefore not open to the Respondent to sit in some boardroom and decide that the Claimant was a poor performer and hence a candidate for redundancy. It was also not lost on the Court that the period during which the Claimant is said to have performed poorly coincided with her gestation period. Was pregnancy the real reason for her termination? I will answer this question shortly.

22. There is one more thing that was wrong with the Respondent's action and it is this; the Claimant had just come through childbirth and was lactating at home when she was served with a letter taking away her livelihood. In the final submissions filed on behalf of the Claimant on 28th January 2019, reference was made to another decision by **Rika J** in **GMV v Bank of Africa Kenya Limited [2013] eKLR** where the learned Judge rendered himself thus:

"The ILO Maternity Protection Convention Number 183 [2000] requires that the pregnant employee is guaranteed maternity leave, and the right to return to the same or equivalent job at the end of her leave. Like our domestic legislation, this Convention requires the employer to prove that the dismissal of the employee was not related to pregnancy discrimination, when the employee has laid the basis to show that she suffered the adverse employment decision based on such discrimination.....International

Human Rights Instruments such as the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provide an international legal framework for the realization of the rights of female employees in relation to their reproductive function.”

23. The domestic legislation referred to in this decision is Section 5(2) and (3) of the Employment Act which provides that:

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or Practice

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or Prospective employee-

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.

24. There is also Section 29(2) of the Employment Act which provides that:

(2) On expiry of a female employee’s maternity leave as provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.

25. The foregoing provisions are further buttressed by Article 27 of the Constitution of Kenya, 2010 which guarantees equality and freedom from discrimination in the following terms:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

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

26. As observed by my sister **Mbaru J** in ***Janine Buss v Gems Cambridge International School Limited [2016] eKLR*** under Section 5(6) of the Employment Act, the burden of disproving an allegation of discrimination lies with the employer. The Respondent was therefore under an obligation to prove that the Claimant’s termination had nothing to do with her pregnancy.

27. The Respondent having failed to discharge this burden and paying close attention to its actions as enumerated in the foregoing parts of this judgment, the Court has arrived at the conclusion that the said actions amounted to unlawful and unfair termination of the Claimant’s employment as well as discrimination against her on account of pregnancy. The Claimant is therefore entitled to both compensation for unfair termination and damages for discrimination.

Remedies

28. Pursuant to the foregoing findings, I award the Claimant twelve (12) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service as well as the Respondent’s callous conduct in the termination process.

29. Additionally, I award the Claimant Kshs. 500,000 as damages for discrimination on account of pregnancy. In assessing quantum under this head, I have taken into account the Respondent’s blatant violation of the Claimant’s right to maternity leave including the right to resume duty at the end of the leave. I have mitigated this with the common cadre nature of her job which, with a bit of effort, she may be able to find elsewhere.

30. Having nullified the respondent’s requirement for the Claimant to serve notice during maternity leave, I award her one (1) month’s salary in lieu of notice.

31. The claim for severance pay was admitted, the only point of departure being the period of service. The Claimant told the Court that she started working for the Respondent in 2007. She however admitted having been issued with a letter of appointment dated 15th May 2009.

32. The Respondent also produced subsequent letters of appointment issued to the Claimant. It seems to me that the employment relationship between the parties was ordinarily evidenced in writing. I therefore adopt the date of 1st June 2009 cited in the letter of appointment dated

15th May 2009 as the effective date of the Claimant's employment with the Respondent. That dispenses with the claim for severance pay.

33. The Claimant herself told the Court that she was paid her salary for the period she was on maternity leave in advance. This claim is therefore superfluous. The claim for underpayment was not proved and is dismissed.

34. Finally, I enter judgment in favour of the Claimant as follows:

a) 12 months' salary in compensation.....	Kshs. 156,372
b) Damages for discrimination.....	500,000
c) 1 month's salary in lieu of notice.....	<u>13,031</u>
Total.....	669, 403

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. The Claimant will have the costs of the case.

37. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF FEBRUARY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwabonje for the Claimant

Miss Nthiga for the Respondent