



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2152 OF 2017

LU YINI.....CLAIMANT

VERSUS

AVIC INTL. BEIJING (E.A) CO.LTD.....1ST RESPONDENT

CHEN ZHE.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 30.10.2017 through Stanley Henry Advocates. She prayed for judgment against the respondents jointly and severally for:

- a) A declaratory order be and is hereby issued that declaring the impugned termination of the claimant's employment by the respondents as unlawful, unfair, wrongful, irregular, unprocedural and discriminatory contrary to the law.
- b) Two full months' salary for the months of June and July, 2017 in the sum of USD 3,000 plus Kshs. 60,000.00.
- c) A month's pay in lieu of notice in the sum of USD 1,500.00 plus Kshs.30, 000.00.
- d) Damages as compensation for unfair and unlawful termination being twelve (12) full months' salary in the sum of USD 18,000.00 plus Kshs.360, 000.00.
- e) Service pay at the rate of 15 days (1/2 month) pay for each year worked which aggregates to USD 1,500 X 1.5 (from November, 2015 to June, 2017) translating to USD 2, 250 and Kshs.45, 000.00.
- f) Payment to the claimant of all the monies which the respondents were legally bound to remit to the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) respectively as monthly statutory deductions by virtue of the claimant's employment.
- g) Reimbursement to the claimant by the respondent of her Hospital Maternity Package to the extent of Kshs.50,000.00 payable to the claimant by virtue of her employment under the respondent's staff health insurance scheme as contained in the letter dated 12.06.2017 authored by M/s AAR Insurance Limited and addressed to Nairobi Hospital.
- h) General damages for malice, victimization and discrimination leading to mental torture, distress, pain, suffering and loss.
- i) A certificate of service.
- j) Interest on (b), (c), (d), (e), (f) and (g) above at court rates from the date of filing the suit until payment in full.
- k) Costs of the suit together with interest thereon at court rates from the date of filing suit until payment in full.
- l) Any other or further relief as the Honourable Court may deem fit to grant.

The respondents filed the statement of defence and Counterclaim on 30.11.2017 through Kairu & McCourt Advocates. The respondents prayed that the claimant's suit be dismissed with costs and judgment be entered in favour of the respondents against the claimant for:

- a) The return of the laptop issued to the claimant or the amount equivalent of the market value of the laptop issued to the claimant.
- b) Costs of the suit and interest thereon.

The claimant filed a response to the counterclaim praying that the same be dismissed with costs.

The 2nd respondent is the Executive Director of the 1st respondent. The 1st respondent is an overseas subsidiary company duly incorporated in the Republic of Kenya under the Companies Act, Cap. 486 Laws of Kenya (repealed) and with offices in Nairobi; being a subsidiary company of the multinational company known as Avic International Beijing Company Limited registered in Beijing, China. The Company's main objects include aviation technology import, electromechanical EPC, cement and building material EPC, and industrial park development and management.

The claimant is an adult female of China nationality married to a Kenyan citizen residing and working for gain in Nairobi at all material time. The certificate of marriage on record shows that the claimant is married to one Mark Irungu Wageche under the marriage laws of the People's Republic of China as registered on 12.10.2015.

There is no dispute that the 1st respondent employed the claimant by the letter dated 16.11.2015 on three months probationary service effective 16.11.2015 in the position of Business Manager. She was to report to the General Manager one Chen Zhe. Her net salary was USD 1, 200.00 per month during the probationary period.

The 1st issue in dispute is whether upon completion of the probationary service, the claimant was eventually confirmed in appointment due to her good performance, the net monthly salary increased to USD 1, 500.00 and later by a further Kshs.30, 000.00 effective March 2017. The claimant's case is that the respondents failed to sign and issue a written contract of service showing the salary increment in that regard. The respondents have denied such increment in the claimant's salary.

The claimant testified that her salary was paid in cash and sometimes by electronic money transfer; further sometimes it was belated after 2 to 3 months. She testified that her salary was increased as pleaded. Further one Mr. Fuping was the Finance Director and he paid her salary. Respondent witness No.3 (RW3) was one Andrew Mambo, the General Manager since 2012. He testified that he was not privy to the claimant's contract of service or salary increment. He testified that the 2nd respondent was the Executive Director and his boss at the Company. Further, the Finance Manager Mr. Fuping had left the respondent's service. RW3 stated that he did not work with the claimant directly due to language barrier. RW3's evidence did not offer assistance towards establishing the claimant's salary after the probationary service.

The respondent's 2nd witness (RW2) was Joy Boyani, the Finance and Administration Assistant. She testified that she was responsible for file keeping, assisting in payroll preparation and preparation of employee contracts of service, among the other duties as designated. She also scheduled meetings and as at the time the claimant left employment, RW2 worked under and reported to the claimant.

The claimant's evidence is that the salary was increased to USD 1,500.00 and effective March 2017 the 2nd respondent in appreciating her satisfactory performance, reviewed her remuneration upwards by a further Kshs.30, 000.00.

The Court returns that there was no dispute that after the probationary service, the claimant continued in unbroken employment until 24.07.2017 when the termination took place. Under section 9(2) of the Employment Act, 2007, it was the obligation of the 1st respondent to set out the terms of the contract of service in writing. Under section 10(7) of the Act the burden of proving or disapproving a term of the contract of service rested with the respondents but they failed to discharge that burden. Indeed, no reason was advanced why the 2nd respondent failed to attend and to give evidence about the claimant's salary after the lapsing of the probationary term. RW2 by her evidence was privy to the documents but offered no useful resolution to the claimant's monthly pay after lapsing of the probationary service. Accordingly, on a balance of probability, the Court returns that as at termination, the claimant's net monthly remuneration was USD 1,500.00 plus, Kshs. 30,000.00.

The 2nd issue for determination is whether the termination of the claimant's employment was unfair or unlawful. The claimant testified that on 21.07.2017 she had an ultra sound test relating her pregnancy. She shared the news about her pregnancy with some Chinese and Kenyan workmates. On 24.07.2017 she was summoned by the 2nd respondent who asked her to explain why she had not reported her pregnancy status to him. She replied that she had not even informed the family until she had confirmed that the baby was developing well. They were conversing in Chinese language. The 2nd respondent then raised his voice and told the claimant that she was no longer permitted to use the company vehicle like the other Chinese employees did because the 1st respondent would not take risks of her pregnancy. The claimant testified that she replied to the 2nd respondent that she did not know that she was required to report to the respondents about her pregnancy as of law or contract. The claimant testified that it was at that point that the 2nd respondent raised his voice and he told the claimant that she would not work at the place any more. The claimant testified that the 2nd respondent told her to leave and never work for the 1st respondent again. The claimant called for a taxi and left the 1st respondent's premises. She was not allowed to clear or given a chance to clear. The 2nd respondent had been the claimant's boss at the material time and that she reported to him.

The 2nd respondent was not a witness and the claimant's account of the circumstances of her termination on 24.07.2017 remains unchallenged. The three respondent's witnesses confirmed that they were not privy to the conversation between the claimant and the 2nd respondent on 24.07.2017. The respondents' witnesses sought to establish that the claimant had been uncooperative at the appraisal of 21.04.2017 and subsequently absconded duty. However, the proceedings of 21.04.2017 filed in Court for the respondent show that the claimant at the appraisal meeting stated that she had worked for over a year and when asked to explain her career position with the company, she got emotional towards the managers and excused herself and, went back to her desk. The conclusive remarks on the claimant are stated thus, **"All managers were disappointed with Ms. Lu Yini's disrespect and suggested discontinuing Ms. Lu Yini's services but Mr.**

Chen Zhe requested them to give her a chance of 3 months on observation.”

The Court has considered the evidence. The Court returns that the events of 21.04.2017 were conclusive and completely exclusive from the meeting between the claimant and the 2nd respondent on 24.07.2017. The Court further considers that even if the respondents desired to terminate the claimant’s services on account of misconduct or poor performance, it was not shown that the procedure of a notice and then a hearing as provided in section 41 of the Act was ever invoked. Accordingly, the Court returns that the claimant’s employment was terminated on account of pregnancy on 24.07.2017 when the 2nd respondent conveyed verbally to the claimant that she would no longer work for the 1st respondent.

Was the termination unfair or unlawful? The Court returns that the answer is in the affirmative. Section 46 (a) of the Act provides that a female employee’s pregnancy or any reason connected with her pregnancy does not constitute a fair reason for dismissal. Further, section 5 of the Act provides for equality of opportunity in employment and elimination of discrimination in employment. The section requires employers to uphold such equality and eliminate discrimination in employment policies and practices. The Court finds that the respondents contravened the section and in particular sub-section 5(3) of the Act which provides that no employer will discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of sex and pregnancy, amongst other grounds.

Further, the Court returns that the contravention also amounted to violation of Article 27 (4) and (5) of the Constitution, 2010 on equality and freedom from discrimination on account of pregnancy. The Court also returns that the respondent’s contravention amounted to violation of the claimant’s right to fair labour practices and to reasonable working conditions as provided in Article 41 of the Constitution.

In view of the unlawful and unfair termination, the Court has considered the cited underpinning and serious constitutional violations. The Court has considered that the claimant desired to continue in employment and had served for slightly over a year. The Court has also considered the mitigation in favour of the 1st respondent that the claimant was uncooperative at the appraisal of 21.04.2017, but a factor that may have, very remotely, contributed to her predicament. The Court awards the claimant 10 months’ salaries in compensation under section 49 of the Act making **Kshs. 300,000.00** plus **USD 15, 000.00**.

The **3rd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows.

The claimant testified that her pay was delayed and as at termination she had not been paid for 2 months, June and July, 2017 and by consent order at the hearing she is already awarded USD 3,000.00 and Kshs.60, 000.00 together with the certificate of service as prayed for.

The claimant’s employment was suddenly terminated without a month’s notice as envisaged in section 35 of the Act and she is awarded **USD 1,500.00** plus **Kshs.30, 000.00** as prayed for.

The claimant was not contractually entitled to alternative service pay or gratuity and she is awarded **USD2, 250.00** plus **Kshs.45, 000.00** as reasonable service pay under section 35 of the Act and as prayed for.

The claimant prays for unremitted NSSF and NHIF. The specific amounts claimed were not pleaded. In any event the claims would be validly pursued under the relevant statutory provisions. Further, as at termination the claimant was not a Kenyan citizen though she was married to a Kenyan and it was not established that the 1st respondent was required by law to contribute NSSF for the claimant. The same will therefore fail as claimed and prayed for.

The claimant prays for Kshs. 50,000.00 under the contractual scheme as per the letter dated 12.06.2017. By that letter the AAR Insurance promised the Nairobi Hospital that it would settle up to Kshs. 50, 000.00 for hospital bill and doctor’s bill with respect to the claimant’s maternity care and delivery that was due in November 2017. The medical insurance cover had been agreed upon but the claimant failed to benefit. The Court considers that the unfair reason for termination was pregnancy and the promise had accrued as at the time of termination of the contract of service. The claimant’s case was that she did not benefit from the cover. However, she did not exhibit the evidence of the cost of her maternity care when the delivery became due. Accordingly, the Court returns that the claimant has failed to strictly prove the claim and it will fail – because it has not been established that she then incurred the cost of Kshs.50, 000.00 promised by the 1st respondent under the insurance scheme. The respondent’s submission in that regard will succeed that the claimant is engaged in unjust enrichment.

The Court has considered the prayer for general damages for malice, victimization and discrimination leading to mental torture, distress, pain, suffering and loss. It is submitted for the claimant that the same be awarded separate from the award for unfair or unlawful termination in view of the mental torture, distress and pain. The mental torture, distress, pain, suffering and loss are expressed as flowing from the discrimination. The Court has already considered the discrimination and harassment as an aggravating factor in awarding the claimant 10 months compensation under section 49 of the Act. In the circumstances of this case, the Court returns that as pleaded and in view of the evidence on record, the compensation for unfair termination is sufficient as a case has not been made out for separate award as prayed for.

The **4th issue** for determination is whether the respondents are entitled to the counterclaim. The claimant testified that she left behind the laptop in issue and she was not given a chance to clear with the respondents. At the hearing a consent order was recorded that the claimant was at liberty to go and collect her personal belongings from the 1st respondent’s premises. The Court considers that taking the evidence into account the claimant did not take away the laptop as claimed. In any event the value of the laptop was not pleaded and the alternative prayer for payment of such value was not properly pleaded or established. The Court returns that the prayer will fail.

In conclusion judgment is hereby entered for the claimant against the 1st respondent for:

- a) The declaration that the termination of the claimant’s contract of service on account of pregnancy and reasons related to the pregnancy was unlawful and unfair.

b) The respondent to pay the claimant a sum of **USD 18,750.00** and **Kshs.375, 000.00** by **01.05.2019** failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

c) The dismissal of the counterclaim with costs in favour of the claimant.

d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 15th March, 2019**.

BYRAM ONGAYA

JUDGE