



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**ELRC PETITION NO. 16 OF 2018**

(Before Hon. Justice Hellen S. Wasilwa on 13<sup>th</sup> March, 2019)

TRACY WANGECHI MUGAMBI.....PETITIONER

VERSUS

WINDSOR GOLF HOTEL AND COUNTRY CLUB.....RESPONDENT

**JUDGMENT**

1. This Petition is dated 1<sup>st</sup> March, 2018 filed by the firm of Njoroge & Musyoka Advocates where the Petitioner prays for:-

a. A declaration that the Petitioner's termination of employment on account of pregnancy amounted to a violation of the Petitioner's rights under Section 5(3) of the Employment Act.

b. A declaration that the termination was in violation of the Petitioner's constitutional rights in particular; Article 27(5) and Article 41(1) of the Constitution of Kenya.

c. A declaration that the Petitioner's termination was in violation of Section 45 and 46 (a) of the Employment Act and therefore unfair.

d. A declaration that the termination was in breach of the Petitioner's contract of employment.

e. A declaration that the Petitioner is entitled to compensation for:

- i. Violation of her constitutional rights as envisaged under Article 23 (3) and Article 41(1) of the Constitution.
- ii. Violation of her employment, legal and contractual rights.
- iii. Neglect and refusal by the Respondent to fulfil contractual demands.
- iv. Injury of the Petitioner on account of the Respondent's breaches.

f. An order that the Petitioner be compensated as follows:

- General damages for discrimination on account of pregnancy and subjecting the Petitioner to servitude and mental torture
- Shoes entitlement Kshs. 18,000/-
- 3 month's salary in lieu of notice Kshs. 132,072/-
- Leave Allowance for 2015 Kshs. 20,695/-
- Gratuity for 6 years Kshs. 59,646/-
- Twelve months salary in compensation for Wrongful termination Kshs. 528,288/-

g. Interest on the above compensation at the rate of 20% per annum from the date of termination of service to the date of payment in full.

## **h. Costs of the Petition**

### **i. Any other relief that this Honourable Court may deem fit and just to grant.**

#### **Facts**

2. The Petitioner in this matter was employed by the Respondent as a hostess on 4<sup>th</sup> September, 2009 and was promoted to the position of supervisor in 2011 a position she retained until 18<sup>th</sup> January, 2016 when the Respondent herein terminated her services from employment.

3. The Petitioner avers that at all times during the subsistence of her employment with the Respondent she demonstrated exceptional and exemplary dedication, competence and to the Respondent's satisfaction.

4. The Petitioner further avers that sometime in October 2014 she was expectant a fact that the Petitioner informed the Management of the Respondent firm and that she continued to dispense her duty diligently and conducted her duties as required.

5. The Petitioner contends that despite her pregnancy she carried out duties as assigned by the Respondent herein and did not complain on her ability to perform duties assigned at that time.

6. The Petitioner further contends that on 4<sup>th</sup> February, 2015, she received a call from the Respondent's Banqueting Manager, who inquired when she was due for delivery which she indicated was July 2015. Further, she stated that the Banqueting Manager informed her that the Respondent's Director had directed that the Petitioner proceeds on leave as she looked tired then report back to work after delivery.

7. The Petitioner states that she did proceed on leave as directed despite the fact that she was not issued with leave forms from the Respondent's Human Resource department for purposes of filling them for records. She further stated that the leave was paid.

8. The Petitioner avers that following her delivery in July 2015, she was on leave until December, 2015. It was her evidence that she received a letter of termination on 18<sup>th</sup> January, 2016.

9. The Petitioner contends that the termination of her employment services was unlawful, wrongful, unfair, arbitrary, in bad faith, discriminatory, unconstitutional and occasioned by factors other than those within the terms and conditions of her contract of employment.

10. The Petitioner states that the decision to terminate her services was discriminatory in that:-

**a. The Respondent failed to promote equal opportunities to the Petitioner in employment and eliminate discrimination in its practices and policies as required by Section 5 (2) of the Employment Act.**

**b. The Respondent violated the Petitioner's right to equal opportunity and equal opportunities in employment by compelling her to go on leave on the basis of her pregnancy, which is against the provisions of Article 27 of the Constitution and Section 5(3) of the Employment Act.**

**c. The Respondent violated the Petitioner's right to return to employment after maternity leave contrary to Section 29 of the Employment Act.**

**d. The Respondent unfairly terminated the Petitioner's employment based on her pregnancy and/or reasons connected to her pregnancy, which is contrary to Section 46 of the Employment Act.**

**e. The termination letter dated 18<sup>th</sup> January, 2016 amounted to summary dismissal, failed to disclose to the Petitioner any gross misconduct she was being accused of contrary to the provisions of her employment contract and Section 44 of the Employment Act and any other law.**

**f. The Petitioner sought a legally acceptable explanation from the Respondent for her termination but the Respondent's Human Resource Department had been evasive.**

11. The Petitioner further states that the acts, decision and omissions by the Respondent contravene Articles 20(1) & (2), 22(1), 23(1), 27, 47(1) & (2), 50(1) and 159 (2) (e) of the Constitution of Kenya, 2010. She further states that the same are also against the provisions of Sections 5, 29(2), 29(3) (a), 29(3) (b), 29(7), 43, 45(2), 45(3), 45(4), 46 and 47(3) of the Employment Act.

12. The Petitioner contends that the Respondent's actions are against Articles 2, 3 and 19 of the African Charter on Human and People's Rights to which Kenya became a state party on 23<sup>rd</sup> January, 1992 that protects an individual right to equal treatment without distinction and/or discrimination of any form in terms of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

13. In Response the Respondent filed a Replying Affidavit dated 29<sup>th</sup> March, 2018 deponed to by Judy Macharia, the Human Resource Manager of Winsor Golf Hotel & Country Club, the Respondent herein.

14. In it she admits that the Petitioner was employed by the Respondent with effect from 3<sup>rd</sup> September, 2009 vide a letter of employment

dated 4<sup>th</sup> September, 2009. She further stated that the said appointment letter provided inter alia:- “Absenting yourself from work without proper cause/carelessly and improperly performing duties” were grounds for summary dismissal.

15. The Respondent contends that in addition to the letter of appointment the Petitioner’s employment was subject to the Respondent’s employee manual that provided grounds for summary dismissal as:-

**i. Absence from duty without leave or lawful cause is a serious offence for which one may suffer summary dismissal**

**ii. Gross negligence of duty**

**iii. Absence from duty without leave or lawful cause**

**iv. Repeated failure to comply with performance requirements despite previous warnings.**

16. The Respondent further contends that during the subsistence of the Petitioner’s employment issues concerning the Petitioner’s discipline arose which culminated in the Respondent issuing the Petitioner with several warning letters on various issues including neglect of duty, unprofessionalism and absenting herself from duty without proper authority. She averred that the Respondent issued a total of five (5) warning letters to the Petitioner.

17. The Respondent avers it was on that basis that the Petitioner’s employment was terminated vide the letter dated 18<sup>th</sup> January, 2016.

18. The Respondent avers that following her termination the Petitioner on 22<sup>nd</sup> April, 2016 demanded for the payment of her terminal dues from the Respondent together with her certificate of service.

19. The Respondent contends that it did proceed to compute terminal dues owing to the Petitioner herein and forwarded the same via its letter to the Petitioner dated 8<sup>th</sup> June, 2016 forwarding a cheque in dues as well as the certificate of service as requested.

20. The Respondent further contends that the Petitioner declined the dues forwarded to her by the Respondent together with the Certificate of Service and the same was duly communicated to the Respondent by the Petitioner’s Advocate letter dated 16<sup>th</sup> June, 2016.

21. The Respondent states that due procedure was followed and that the Petitioner was rightfully dismissed. They urged the Court to dismiss the Petition herein with costs to the Respondent.

#### **Petitioner’s Submissions.**

22. The Petitioner submitted that her termination was indeed unfair since she was neither informed of the reason for termination nor was she given any notice and hearing prior to her termination of employment.

23. The Petitioner further submitted her termination was unfair as the Respondent failed to follow provisions for fair termination as provided for under Section 41 of the Employment Act, 2007, which provides that an employer must first explain to an employee the reasons for the termination and then hear and consider any mitigation from the employee in the event there is any behaviour complained of before proceeding to terminate the employee.

24. The Petitioner relied on the Authority of Shankar Sakalani Vs DHL Global Forwarding (K) Ltd (2012) eKLR where the Court held that:-

**“A hearing and notification on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on grounds of misconduct, poor performance or physical incapacity of the employees; ‘gross misconduct’ that justify summary dismissal under Section 44 (4) and conduct amounting to a fundamental breach of an employee’s obligations as envisaged in Section 44(3) of the Act are ‘misconduct’ for which a notification and hearing are necessary as envisaged under Section 41 of the Act: Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35 (1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for any obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without notice as envisaged under Section 44 (1) of the Act. Thus Section 44(1) of the Act does not entitle the employer to terminate without notice...”**

25. The Petitioner for emphasis also relied on the case of Peris Nyambura Kimani Vs Dalbit Petroleum Ltd Petition 63 of 2015 for further emphasis on the issue of notice.

26. The Petitioner further submitted failure to conduct a hearing prior to termination amounts to unfair labour practice. The Petitioner for emphasis relied on the case of Yvonne Achitsa Odedere Vs Maseno University Cause No. 383 of 2015 where the Court held that **failure to conduct a hearing prior to termination of employment amounted to unfair labour practice and the Claimant was entitled to compensation for unfair termination of employment.**

27. The Petitioner averred that the Respondent did not allow the Petitioner to have a representative from the Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers present in any disciplinary hearing as provided for under Section 41 of the

Employment Act, 2007 as well as the Agreement between the union and the Respondent herein which covered the Petitioner who is a member of the said union. For emphasis the Petitioner relied on the Authority of **Kenya Union of Commercial Food and Allied Workers Vs Meru North Farmers Sacco Ltd (2013) eKLR** where the Court held that:-

**“An employer with knowledge of an existing recognition agreement with a particular union, whenever there are issues with regard to regulation of work relations, the union is to be involved. In the eventuality that an employee is to face summary dismissal or termination, Section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self. Where such an employee is unionised, this process must be conducted in the presence of the shop floor representative of the union. Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such a termination is unfair. The union must be involved at the hearing before an employee is terminated as the union is there to regulate employer and employee relations and to ensure that their member employees get a fair chance to advance their defence with representation by the union...”**

28. The Petitioner further avers that her termination was discriminatory as she was terminated on the basis of her pregnancy in complete violation to Section 5 of the Employment Act. She further submitted that she has satisfied the conditions to prove discrimination as set out in the Authority of **GMV Vs Bank of Africa Kenya Limited Cause No. 1227 of 2011.**

29. The Petitioner contends that the Respondent's refusal to allow her fill in the leave forms through the Respondent's Human Resources Department was a clear indication that the Respondent did not want the Petitioner's leave to be official forcing her to proceed on leave without any official record and the Respondent now claims that the Petitioner absented herself from duty without proper cause. The Petitioner for emphasis relied on the case of **Claudine Wanjiku Mboce Vs Exon Investments Limited & Another Cause No. 619 of 2015** with similar circumstances to those in this instant case and the Court held that *it was satisfied that the Claimant was discriminated against on account of her pregnancy.*

30. The Petitioner further contends that she is entitled to the reliefs sought in her Petition under the provisions of Section 49(1) of the Employment Act and Section 12(3) of the Employment & Labour Relations Act.

31. The Petitioner further submitted that she is entitled to an award of general damages of Kshs. 4,000,000/- for discrimination on account of pregnancy and relied on the Authority of **VMK Vs CUEA Cause No. 1161 of 2010** where the Court awarded the **Claimant Kshs. 5,000,000/- in general damages for discrimination on grounds of pregnancy and HIV status.**

32. The Petitioner urged the Court to allow her Petition as prayed.

#### **Respondent's Submissions.**

33. The Respondent submitted that the Petitioner was summarily dismissed on 18<sup>th</sup> January, 2016. It is further submitted that the said summary dismissal was procedural and in accordance with the provisions of Section 44 of the Employment Act as well as the Respondent's employee manual which provided for grounds for summary dismissal.

34. The Respondent avers that the Court ought to examine past conduct of an employee in coming up with its determination. The Respondent further avers that the Petitioner in this matter had a record of at least five (5) offences that amounted to gross misconduct, and which offences cumulatively point to an employee who should have been terminated but she was not.

35. For emphasis the Respondent relied on the Case of **Kenya Union of Commercial Food and Allied Workers Vs Meru North Farmers Sacco Limited (2014) eKLR** where the Court held that:-

**“I note the grievant as an employee who had long history of gross misconduct that should have warranted summary dismissal under the provisions of Section 44 of the Employment Act. He had a total of 46 complaints against him... these cumulative points to an employee, who should have been terminated long before 18<sup>th</sup> November, 2011.**

**...Based on the record of the grievant with the Respondent noting the circumstances in which the termination took place, including the extent the grievant acted, I find he contributed to the termination of his employment.”**

36. The Respondent further avers that the Petitioner was duly given an opportunity to represent herself as evidenced by statements recorded and annexed to the Replying Affidavit. The Respondent for emphasis relied on the case of **Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009** as cited in **Republic Vs National Police Service Commission Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR** where the Court held that:-

**“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the decree of fairness appropriate to their tasks. It is for them to decide how they will proceed”.**

37. The Respondent contends that the Petitioner was not a victim of discrimination as alleged but was terminated on account of summary dismissal.

38. It is further submitted that the Petitioner has not brought sufficient evidence to this Court to support the assertion that she was a victim of

discrimination on the basis of her pregnancy. For emphasis the Respondent relied on the Authority of **Alnashir Popat & 8 Others vs Capital Markets Authority, Petition 245 of 2016** where the Court held that *for a party to claim discrimination he must demonstrate by evidence or argument how he has been discriminated.*

39. The Respondent submitted that the Petitioner's termination was not on account of her pregnancy as she was terminated on 18<sup>th</sup> January, 2016, six (6) months after she had delivered, therefore there is no nexus between her termination and her pregnancy.

40. The Respondent proceeded to distinguish the case of **GMV vs Bank of Africa Kenya Limited** relied on by the Petitioner whereby in that authority the Claimant thereto was terminated three (3) weeks to the due date of delivery while in the instant Petition the Petitioner was terminated six (6) months after she had delivered.

41. The Respondent submitted that the Petitioner is not entitled to the reliefs sought in the Petition as she is the one who declined her terminal dues as the Respondent was willing to pay the same as evidenced by the letter forwarding payments to the Petitioner.

42. In conclusion, the Respondent prays that the Petition be dismissed with costs to the Respondent.

43. I have examined all the evidence and submissions before me. The Petitioner was terminated vide a letter dated 18/1/2016. The letter does not assign any reason to the termination. This clearly offends the provisions of Section 43 of Employment Act 2007 which provides as follows:-

**1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.**

44. It therefore follows that the Respondent had no valid reason to terminate the services of the Petitioner. The Petitioner on her part alleges that she was terminated due to her pregnancy. She had indicated that when the Respondent noted that she was expectant, the Respondent's Banqueting Manager asked her to proceed on leave as she looked tired.

45. She proceeded on leave as directed on February 2015 but her due time was July 2015 as per the baby's birth notification attached to Court.

46. This in effect means that she started her maternity leave on 17/7/2015 and being entitled to 90 days leave, the maternity leave ended by the end of the year if it was leave covering working days only and by 17<sup>th</sup> October if inclusive of weekends and holidays. The contract of the Petitioner and Respondent is not clear on this though.

47. Even assuming that maternity leave ended by October 2015, she was terminated soon thereafter after 2 months. The Respondent avers that she was terminated due to absconding duty. This cannot be far from the truth as it was true that she was pregnant and evidence has been produced to show she had a baby in July 2015 and was therefore on maternity leave.

48. The other reason the Respondent seems to assign to Petitioner's termination is poor performance leading to various warning letters.

49. The last warning is dated 25/3/2014 and it related to delivering a customer's room service order late. A repeat was to warrant a more severe action. There is no indication that the Petitioner repeated this breach before January 2015 when she was terminated.

50. There is also no indication that the termination was related to the said warning letters. The averment by the Respondent that the Petitioner was terminated following various warnings is therefore not true.

51. There is no indication that the Petitioner committed any other offence from July 2014 to January 2015 when she delivered her baby. The issue of absconding duty is also not raised in the termination letter. This leaves the Court with only one plausible reason for termination being pregnant and delivering a baby.

52. Other than there being no valid reason to terminate the Petitioner, the Petitioner was also denied an opportunity to present her case and be subjected to due process. She was never served with a Notice to show cause (NTSC) why her services should not be terminated. She was also not given an opportunity to cross-examine her accusers if any.

53. The Respondent invariably breached Section 41 of Employment Act 2007 which provides as follows:-

**1. “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1)**

make”.

54. In **Claudine Wanjiku Mboce vs Exon Investments Limited and Another**, (supra) the Court was faced with similar circumstances as in the current case and made a finding that the Petitioner was discriminated against on account of her pregnancy.

55. In the current Petition, I have not found any plausible reason for terminating the Petitioner after reporting from maternity leave other than the inconvenience, the Respondent may have anticipated from the Petitioner following delivery of a baby. This indeed is against Article 27 of the Constitution, which forbids discrimination.

56. Article 27 (1 to ) of the Constitution states as follows:-

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, sex, 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).**

57. Article 27(4) is explicitly clear that no one should be discriminated against on account of pregnancy. The Petitioner having been terminated just after resuming duty from maternity leave was indeed discriminated against on this account and I find this actionable against the Respondent.

58. Given that the Petitioner was also terminated without any valid reason and without due process, I find the Petitioner’s termination unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 which states as follows:-

2. **“A termination of employment by an employer is unfair if the employer fails to prove:-**
  - a. **that the reason for the termination is valid;**
  - b. **that the reason for the termination is a fair reason:-**
    - i. **related to the employee’s conduct, capacity or compatibility; or**
    - ii. **based on the operational requirements of the employer; and**
  - c. **that the employment was terminated in accordance with fair procedure”.**

59. In view of my findings above, I find for the Petitioner and I award her as follows:-

1. **General damages for discrimination on account of pregnancy to the tune of 2 million.**
2. **3 months’ salary in lieu of notice = 29,824 x 3 = 89,472 as per the termination letter.**
3. **Gratuity for 6 years =  $\frac{1}{2}$  x 29,824 x 6 = 89,472/=**
4. **12 months salary as compensation for unlawful and unfair termination = 12 x 29,824 = 357,888/=.**
5. **Shoe entitlement = 18,000/=.**
6. **Leave allowance for 2015 = 20,695/=.**

**Total = 2,575,527/=.**

7. **The Petitioner will also be entitled to costs plus interest on the above amount at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 13<sup>th</sup> day of March, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Omagwa holding brief Gichumbi for Petitioner – Present

Miss Muchiri for Respondent – Present