



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 250 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 30th April, 2019)

CHRISTINE NJERI GITHIRICLAIMANT

VERSUS

ANNE WAITHERA KIMOTHO T/A

COSEC ASSOCIATESRESPONDENT

JUDGMENT

1. The Claimant filed suit through the firm of Okubasu & Munene Advocates seeking damages for wrongful, illegal and unfair dismissal.
2. She avers that she was employed by the Respondent on 1st August, 2015, vide an oral contract in the capacity of an associate advocate earning a net salary of Kshs. 100,000/= per month. That she worked diligently and had never received any warning or complaint from the Respondent.
3. It is her contention that on 22nd May, 2017, when she was supposed to proceed on her maternity leave she was informed her services will no longer be required. That she was not advanced reasons for the abrupt and unprocedural termination but was only informed by the Respondent that she would not be in a position to sustain her anymore.
4. The Claimant avers that the Respondent undertook to pay her for the 90 days' maternity leave and one month in lieu of notice, which the Respondent did not honour. It is the Claimant's position that she was summarily terminated because of her pregnancy and that amounted to discrimination contrary to Article 27(5) of the Constitution of Kenya, 2010.
5. She further avers that the termination was unlawful for the reason that she was not given any reasons for the termination in the presence of an employee or representative of her choice. Further that the reason that the firm was not in a position to sustain her anymore was untenable as the firm was making profits. She also claims that she was not afforded a hearing before the termination.
6. The Claimant also claims that the circumstances surrounding her dismissal would lead one to believe that she was only being dismissed because of her pregnancy. That she was entitled to leave and she had not taken any leave in year 2016 for the reason that she had requested the Respondent to proceed on leave but was not that it was not possible as there was no one to relieve her.
7. She contends that the termination was unlawful and contrary to the principles of natural justice, fundamental human rights and equity. She therefore prays for the following:
 - a. A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and or unfairly.*
 - b. A declaration that the Claimant's termination of employment on account of pregnancy, amounted to a violation of the Claimant's rights under section 5(3) of the Employment Act No. 11 of 2007.*
 - c. A declaration that the termination was in violation of the Claimant's constitutional rights in a particular Article 27(5) and Article 41(1) of the Constitution of Kenya.*
 - d. A declaration that the Claimant's termination was in violation of Sections 45 and 46 of the Employment Act and therefore unfair.*

e. An Order that the Claimant be compensated as follows:-

1. Loss of three months' maternity leave entitlement as an employee at Kshs. 300,000/=.

2. General damages for discrimination on account of pregnancy and subjecting the Claimant to servitude and mental torture at Kshs. 300,000/=.

3. Two months' salary in lieu of notice at Kshs. 200,000/=.

4. Twelve month's salary in compensation for wrongful termination at Kshs. 1,200,000/=.

5. Thirty days payment in lieu of leave days earned at Kshs. 100,000/=.

f. Costs and interest of the claim.

g. Any other or further relief that this honourable court may deem fit and just to grant.

8. The Respondent entered appearance in person but did not file any defence nor participate in the hearing.

9. The Claimant led evidence as set out in the Memorandum of Claim and her witness statement and urged the Court to allow the same.

Submissions

10. The Claimant submits that she was unfairly terminated on account of pregnancy contrary to Section 5(3) (a) and 29(2) of the Employment Act. The Claimant relied on the case of **Claudine Wanjiku Mboce Vs Exon Investments Limited & Another (2017) eKLR** where the Judge found that the Claimant was unfairly discriminated by the Respondent on account of her pregnancy.

11. It is submitted that the Claimant is entitled to the prayers sought as Section 43 read together with Section 45 of the Employment Act requires an Employer to show a valid reason or reasons for termination, and carry out the process fairly which was not done in the Claimant's case.

12. It is submitted that the damages for discrimination on account of pregnancy should not be capped at 12 month's salary but should be in the nature of general damages, to be determined by the Court as was stated in the case of **Claudine Wanjiku Mboce Vs Exon Investments Limited & Another (Supra)**. That the Court should allow the prayers sought in the Memorandum of Claim.

13. I have examined all the evidence and submissions before me. The Claimant filed this claim on 9/3/2018.

14. The Respondent was served with the Memorandum of Claim and summons to enter appearance and they entered appearance on 17/8/2018 in person.

15. The Respondents thereafter never filed any defence. This matter thereafter proceeded ex parte. From the evidence of the Claimant, there is no indication that the Claimant ever worked for the Respondent. The Claimant indicated that she was employed as an Associate for 2 years and that the contract was oral.

16. However, even if the contract was oral, the Claimant was in a position to prove she actually worked through submission of her sample work. The Claimant was also in a position to bring evidence in form of how she was paid to show flow of some money from the Respondent to herself in form of remuneration. The Claimant failed totally to do so.

17. She also never called any witness to testify on her behalf. What remains is that the Claimant failed to prove her own case by not proving that she had an employment relationship with the Respondent. In the circumstance, I find the claim not proved and I dismiss this case accordingly with no order as to costs.

Dated and delivered in open Court this 30th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Munene for Claimant – Present

Respondent – Absent