



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 350 OF 2018

BETWEEN

MARGARET INJETE SHADRACK.....CLAIMANT

VERSUS

RADAR SECURITY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Opwapo Advocates for the Claimant

No appearance for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim, on 28th May 2018. She avers that she was employed by the Respondent Company on 30th March 2012 as a Guard, receiving a monthly salary of Kshs. 7,800.

2. She worked 6 days a week, from 6.00 a.m. to 6.00 p.m. She worked on Public Holidays. She was not paid overtime.

3. She became pregnant in October 2014. She applied for maternity leave on 30th April 2015. She was in reply, told by the Respondent to proceed for maternity leave with effect from 1st May 2015. She was asked also, on the same date, to return all uniforms and other items in her possession, before she could receive her final dues. The letter dated 30th April 2015, signed by Administration Manager Ivy Rita Mwalimo, ends with the note that, " we wish you all the best in having a bouncing baby."

4. The Claimant avers she was discriminated against, on account of her pregnancy. Termination was on account of her pregnancy. She was denied her salary for the period of maternity leave. She did not take annual leave, and received no pay in lieu of annual leave, on any occasion. Her monthly salary was below the minimum wage applicable to private security industry.

5. Against this background she prays for Judgment against the Respondent as follows:-

- a) Declaration that the Claimant was discriminated against on account of her gender/ pregnancy.
- b) Declaration that termination was procedurally unfair.
- c) Undercutting of salary inclusive of house allowance at Kshs. 34,342.
- d) Overtime of 4 hours every normal working day, for 3 years at Kshs. 320,923.

- e) Severance pay for 3 years at 22,500.
- f) Accrued annual leave for 3 years at Kshs. 28,141.
- g) Maternity leave pay at Kshs. 33,774.
- h) Public holiday pay at Kshs. 15,988.
- i) 1 month salary in lieu of notice at Kshs. 11,258.
- j) 12 months' salary in compensation for gender discrimination at Kshs. 135,096.
- k) 12 months' salary in compensation for unfair termination at Kshs. 135,000.

Total...Kshs. 827,184.

- l) Interest.
- m) Costs.
- n) Any other suitable relief.

6. There is on record, an Affidavit of Service sworn by a Court-Process Server on 26th June 2018, indicating Notice of Summons, together with a copy of the Statement of Claim, were served upon Respondent's Administration Manager, Ivy Mwalimo, on 5th June 2018. Service was acknowledged. The Respondent did not enter appearance or file any response. The matter proceeded by way of formal proof, on 5th December 2018.

7. The Claimant adopted in her evidence, her documents on record, listed as exhibits 1-8. She consulted her Trade Union after termination. Consultation between the Union and the Respondent did not yield settlement. She was offered Kshs. 32,000 only as settlement, which she rejected. She affirmed the contents of her Pleadings, and Witness Statement on record.

The Court Finds:-

8. The Claim is uncontested.

9. The Claimant has shown through her Witness Statement, Statement of Claim, Documents and Oral Evidence on record, that she was employed as a Guard by the Respondent, on 30th March 2012.

10. She was dismissed on 30th April 2015, after she applied for maternity leave. She was asked to surrender Respondent's uniforms and other tools of trade. She would receive her final dues, upon clearing. She was wished all the best by the Respondent, "in having a bouncing baby."

11. The Respondent was extremely callous and discriminated against the Claimant, on account of her gender and pregnancy. This behaviour infringed upon the Claimant's fundamental rights under Article 27 [5] of the Constitution; and Sections 5[3] and 29 of the Employment Act 2007. The Claimant was denied her right to take maternity leave and return to work in the same, or comparable position; she was denied her salary while on leave; she was discriminated against on account of her pregnancy and dehumanized with a sarcastic note about having a bouncing baby, even as her contract was being terminated; there was no reason at all given to justify termination; and no hearing of any shade took place. The Respondent has not responded to the Claim, perhaps upon realizing that its conduct was simply indefensible.

12. The amounts sought under different heads are not disputed. The items are uncontested. They are within the law.

13. The Claimant misconceives damages for pregnancy discrimination. This, as pointed out by the Court in previous decisions, is not limited to 12 months' salary in compensation. It is a violation that involves the Constitution and the Employment Act, for which a victim of pregnancy discrimination should be in position to plead general damages, not capped statutory compensation. As the Claimant pleads 12 months' salary in compensation for pregnancy discrimination however, the Court shall not amend her prayer, and consider a higher award in damages. She also misconceives requirements for fair termination of employment. She reduces this to declaration that termination was procedurally unfair, while quite clearly, termination offended requirements for procedural as well substantive fairness under Sections 41, 43 and 45 of the Employment Act 2007. Lastly, the prayer for severance pay shall be granted under service pay, as there was no evidence of redundancy, requiring the Court to invoke Section 40 on severance pay.

IN SUM, IT IS ORDERED:-

- a) It is declared that the Claimant was discriminated against on account of her pregnancy.***
- b) It is declared that termination was unfair.***

c) The Respondent shall pay to the Claimant compensation, damages and terminal dues at Kshs. 827,184 as pleaded.

d) Costs to the Claimant.

e) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 21st day of June 2019.

James Rika

Judge