



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NUMBER 137 OF 2015

BETWEEN

**NYALI ACADEMIC SERVICES LIMITED T/A THE
MOMBASA ACADEMYCLAIMANT**

VERSUS

CAROLINE OPONDORESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Daly & Inamdar, Advocates for the Claimant

Odongo B.O. & Company Advocates for the Respondent

JUDGMENT

1. The Employer, contrary to most Claims presented before this Court, is the Claimant herein. The Employee is the Respondent.
2. The Statement of Claim was filed on 20th March 2015. The Claimant states it employed the Respondent as an Arts Teacher, on a fixed term contract, beginning 1st September 2013, ending 30th June 2015. Her net monthly salary, including responsibility allowance, was Kshs. 47,093. The Respondent was under obligation to issue the Claimant 1 school term written notice [3 calendar months’], commencing on the 1st day of the 3rd term, in event of termination, or pay to the Claimant 3 months’ salary in lieu of such notice.
3. Through a letter dated 20th August 2014, received by the Claimant on 2nd September 2014, the Respondent requested from the Claimant, maternity leave of 3 months. The Claimant was not aware that the Respondent was expectant prior to this.
4. She was allowed to take leave, to end on 20th November 2014.
5. While on maternity leave, the Respondent purported to issue to the Claimant notice of resignation of 3 months. The letter issued on 10th September 2014. The Respondent stated effective date was 1st September 2014. The notice was invalid as it was not for 3 months given under the contract, and did not issue on the 1st day of the 3rd term.
6. The Claimant rejected the notice and advised the Respondent, in a letter dated 17th September 2014, to return to work at the end of maternity leave, or to pay the Claimant 3 months’ salary in lieu of notice. The Respondent did not reply to this letter.
7. The Claimant later learnt that the Respondent was teaching at another School while still on maternity leave.
8. She had been advanced an interest free car loan of Kshs. 150,000 by the Claimant. She had a balance of Kshs. 86,000 by the time she left employment. She owes the Claimant this amount of Kshs. 86,000 and 3 months’ salary in lieu of notice at Kshs. 141,279- **total Kshs.**

227,279.

9. The Claimant seeks Judgment against the Respondent for the sum of Kshs. 227,279, costs, interest and any other suitable relief.

10. The Respondent filed her Statement of Response and Counterclaim, on the 14th April 2015.

11. She concedes to have tendered her resignation, but states she was compelled to do so by the Claimant.

12. Her formal employment with the Claimant commenced on 1st September 2009, running up to 15th July 2011.

13. She was to be paid a net salary of Kshs. 65,000 monthly.

14. She was surprised to find her basic salary was stated in the pay slip to be Kshs. 50,000. After deductions, it was Kshs. 40,459. In 2010 the salary was reduced to Kshs. 35,449 monthly. She had joined a SACCO, and was being deducted Kshs. 5,100 in monthly savings. The lowered rate remained in force to the end of the 1st contract.

15. She executed another contract on 1st September 2013. Her salary was reduced from Kshs. 65,000 to Kshs. 47,093 monthly. Her pay slip reflected again, a lower monthly salary of Kshs. 35,344 which was also subject to statutory deductions.

16. It is the Claimant who breached the contract entered into by the Parties.

17. The Claimant had blatantly refused to grant the Respondent maternity leave, the Respondent having first requested to be released on 20th August 2014. She had delivered 3 weeks before on 23rd July 2014, when the School was on normal vacation.

18. Resignation was forced on the Respondent. She could not report to work a month after giving birth. She was constructively dismissed.

19. She counterclaims salary arrears for 2009 -2014 at Kshs. 1,648,664. She prays the Court to find termination was unfair and award her compensation equivalent to 12 months' salary at Kshs. 565,116. She seeks exemplary damages, costs, interest and any other suitable relief.

20. The record does not contain any Response to the Counterclaim.

21. The Claimant called 3 Witnesses- Finance and Administration In-Charge, Bhanumati Dhinajlal S. Bhatti, who gave evidence on 7th March 2018; Head-teacher Carey Wilberforce Yiembe; and Accountant Samuel Muchiri Muiga, who both gave evidence on 17th September 2018, closing the Claimant's case. The Respondent, Caroline Akinyi Opondo, gave evidence and closed her case, on 10th December 2018.

22. **Bhatti** confirmed that the Respondent worked for the Claimant as an Arts Teacher. She got a car loan from the Claimant for Kshs. 150,000 in January 2014. She paid Kshs. 64,000 and had a balance of Kshs. 86,000 by the time she left employment.

23. She applied for maternity leave on 1st September 2014. She was to return in November 2014. She resigned on 10th September 2014 while on maternity leave. She did not issue the Claimant 3 months' notice of termination, as stipulated under her contract. The Claimant seeks notice pay, and loan balance.

24. Cross-examined, Bhatti testified he has worked with the Claimant from the year 2004. He confirmed that the Respondent first joined the Claimant in 2009. She was to earn a monthly net salary of Kshs. 65,000. She was paid this.

25. Pay slip of December 2009 shows a salary of Kshs. 40,549. Basic salary is shown at Kshs. 50,000. Kshs. 24,500 was paid to the Respondent in cash. It was a verbal arrangement.

26. Her salary was reduced from 2011. This was by agreement of the Parties. She was paid Kshs. 47,000. It was further reduced to Kshs. 33,000. The Respondent consented to reduction because there was reduced workload. Accountant retained all records.

27. She received Kshs. 24,000 in cash, and Kshs. 40,459 in cheque- total Kshs. 65,000.

28. She took maternity leave, then wrote to the Claimant, and said she had resigned. She had already delivered on 9th August 2014. The Claimant did not give her maternity leave in writing. The Claimant learnt the Respondent had been employed by Jeffreys Academy Mombasa. Her resignation was not forced. It is not possible that she was employed by Jeffreys because she had just given birth. It is not true that the Claimant does not allow Teachers to take maternity leave.

29. Redirected Bhatti told the Court that pay slips are prepared by the Accountant. The Respondent had gone on maternity leave, prior to the year 2014. She did not complain that she was forced into resigning; she stated she was resigning for professional development.

30. **Yiembe's** evidence is that the School was on vacation on 29th June 2014. He was the Deputy Head. On 28th August 2014, the Respondent went to the School. She told Yiembe and others that she had good news: she had delivered a baby during the vacation. She had a letter she wished to pass on to the School Head. Yiembe advised her to hold the letter as the Head Teacher would be resuming the following

week.

31. On 29th August 2014, Yiembe was advised the Head Teacher would not return and he would be acting as the Head. He received the Respondent's letter on 1st September 2014. The letter was dated 20th August 2014. The Respondent sought maternity leave. It did not disclose when she delivered.

32. She was advised leave would begin on 20th August 2014, and end 20th November 2014. Yiembe received information from Parents and Pupils that the Respondent had been sited at Jeffreys Academy where she had started teaching. Yiembe called Jeffreys Head Valentine, who did not receive his calls. On 10th September 2014, the Claimant received resignation letter from the Respondent. She did not issue 3 months' notice as stipulated. She was not compelled by the Claimant to resign. She gave reason for her decision in her letter of resignation. The Claimant does not deny Teachers maternity leave. She did not give birth in October 2014, so as to allege she was being asked to return to work 1 month after she gave birth. Records from Bomu Hospital shows she was discharged, on 19th July 2014, having been admitted the previous day. The notification of birth however showed the baby was born on 23rd July 2014. The Respondent did not shed light on the discrepancies.

33. Cross-examined, Yiembe told the Court he consulted Management in making his decisions. The Respondent was advised on her maternity leave by the Claimant. Yiembe did not write to her on the very date, approving maternity leave. He replied to the Respondent's application for maternity leave, after the Respondent brought her resignation letter. The Claimant did not decline to let the Respondent go on maternity leave. Yiembe was not at the School in 2010. He did not have records of her previous maternity leave. The Respondent currently teaches at Jeffreys Academy. Redirected the Witness stated information on delivery of the Respondent's baby came to the Claimant as a surprise. She had not given notice of resignation before applying for maternity leave.

34. Accountant Muiga confirmed details of Respondent's employment, as narrated by his Co-Witnesses above. It is not true, that the Respondent was not paid her salary as promised.

35. She was to receive a net salary of Kshs. 65,000 monthly under the first contract.

36. The register of salaries showed in September 2009, she earned basic salary of Kshs. 50,000. Total deductions were Kshs. 9,451. Her net salary was Kshs. 40,347. This sum of Kshs. 40,347 was paid by cheque. Kshs. 25,451 was paid in cash. Total was Kshs. 65,000 as contracted.

37. Second contract set in January 2011. Her salary was reduced by consent to Kshs. 33,000 net. This was two-thirds of the previous amount of Kshs. 65,000. She was paid Kshs. 28,000 in cheque, and Kshs. 14,000 in cash. Reduction in salary was necessitated by diminished lessons taught by the Respondent. She worked half-day from January 2011 to August 2011. There was renewal of the contract in November 2013. Her salary was increased by Kshs. 2000, giving her a monthly salary of Kshs. 35,334. If she had been underpaid, she would have complained. She was paid what was agreed. She did not pay the balance of her car loan at Kshs. 86,000. She was paid gratuity in 2011, after 2 years' service, in accordance with the contract, at Kshs. 40,667.

38. Cross-examined, School Accountant testified that Kshs. 65,000 initially paid to the Respondent as monthly salary, was a net sum. It was the sum payable after all deductions. The second contract gave her Kshs. 33,334 after deductions. The third contract gave her a net amount of Kshs. 47,000. The Accountant was told by consultant that her basic salary was Kshs. 50,000. This is how the Respondent administers its payroll. PAYE tax was based on Kshs. 50,000. The basic would be Kshs. 65,000.

39. There was no written agreement that the Respondent received her salary partly in cash and cheque. There was a verbal agreement between the Parties. The figures presented by the Claimant to the Court are not manufactured. The Respondent signed against the salary register. The car loan was not shown in her pay slips. It was given in cash, and repayable in cash.

40. Redirected, Muiga told the Court there was no document produced by the Respondent, denying that she took a car loan. She was to pay through cash received from the Claimant as part of her salary. She signed salary register voluntarily. The Respondent adopted the mode of salary payment based on the advice of its consultant.

41. The Respondent, Opondo, told the Court she is a Teacher at Jeffreys Academy in Mombasa. She did not have any oral agreement with the Claimant, to receive part of her salary in cash, and the other half in cheque. She signed the salary register. The columns containing salaries shown to have been paid to her, did not contain figures at the time she signed. The document must have been prepared after the Respondent filed her Counterclaim.

42. She joined the Claimant in 2009. She signed a contract of 2 years. She delivered in September 2010. She asked to go on maternity leave. She was called by the Claimant on 3rd November 2011, and told to sign a letter, agreeing to reduction of salary. She had 1 year left to the end of her contract. She did not have an option, but to sign the letter. Her Colleagues did not suffer salary cut. The Claimant was discriminated against on the ground of pregnancy.

43. The discharge summary on record, relates to her second baby. She delivered on 23rd July 2014. She was entitled to a car loan of Kshs. 150,000. The amount was not sufficient to buy a car, but the Respondent took it. She was not happy with the loan contract. She tendered resignation. It was the only option.

44. Cross-examined, Opondo told the Court that she resigned and joined another Academy. She admits she had a car loan, and she had not paid it in full, by the time she left employment. She served under 2 different contracts. She earned Kshs. 65,000 monthly. She completed her first contract. She was not paid what was agreed. Her salary was reduced.

45. Her lessons, and every other Teacher's, were reduced. She had no choice but to accept reduction. She worked for another 4 years after 2011. She complained about reduction of her salary.

46. She delivered her second baby on 23rd July 2014, during the long vacation. She was to notify her Employer, at the right time, of her intention to go on maternity leave. The School was closed. She could not give her letter to anyone. She did not have evidence of any Teacher, from the Claimant School, whose contract was terminated on account of pregnancy. She did not receive demand letter from Claimant's Advocates. She received the e-mail version. She resigned in September 2014. She said she resigned because of financial constraints and need for professional development. This was a forced resignation. She joined Jeffreys Academy in September 2014. She resigned because she wanted to join another School.

47. Opondo concluded her evidence on redirection, with the clarification that she wrote her letter seeking maternity leave on 20th August 2014. She delivered it to the Respondent in September 2014. The Claimant replied on the application for maternity leave, simultaneous with the reply to the letter of resignation.

48. The Court understands the **issues in dispute to be:-**

- i. Whether the Respondent owes the Claimant car loan balance of Kshs. 86,000.
- ii. Whether the Respondent owes the Claimant notice pay equivalent of her 3 months' salary.
- iii. Whether the Respondent was discriminated against on the ground of her pregnancy and unfairly/ constructively dismissed by the Claimant.
- iv. Whether she is owed salary arrears at Kshs. 1,648,664.
- v. Whether she merits compensation for unfair termination, and exemplary damages.
- vi. Who should bear the costs of this litigation?

The Court Finds: -

49. The Respondent was first employed by the Claimant as an Arts Teacher, through a contract dated 1st September 2009. It is not contested that this contract commenced on 1st September 2009, ending 15th July 2011.

50. The Respondent served to the end of her contract.

51. She appears to have continued serving between July 2011 and 1st September 2013, without a written contract.

52. On 5th November 2013, the Parties signed a second contract to cover the period 1st September 2013 to 30th June 2015. It is under this contract that the Respondent left employment in contentious circumstances. She left prematurely, on 10th September 2014, through resignation.

Car Loan

53. The Respondent applied for a car loan of Kshs. 150,000 on 4th December 2013. She undertook to have the loan recovered in full from her salary. Her letter to the Claimant applying for the loan is on record. She conceded in her evidence that she received the loan amount. She also accepted that she had not repaid the full amount by the time she left employment. It is not relevant to this dispute whether the amount loaned to the Respondent, was enough to purchase a car. The Respondent applied for the loan, and had an obligation to pay it in full. She conceded she owes the amount. **The Respondent shall pay to the Claimant loan balance at Kshs. 86,000.**

Notice

54. Clause 7 [ii] of the contract executed on 5th November 2013, states: -

‘ Either Party may terminate the contract without the necessity for explanation, by giving of a **term's written notice** to the other Party, commencing on the first day of the **Third Term**, or giving of three months' salary in lieu of notice.....’

55. The Respondent issued her notice of resignation on 10th September 2014. The notice was for 3 months' said to commence in September 2014.

56. The notice did not issue on the 1st day of the third term as stipulated in the contract. In her evidence on cross-examination, the Respondent conceded that she did not resign in accordance with the contract. She testified that she resigned in September 2014, which was in the Claimant's academic calendar, during the first term, not the third term.

57. The Claimant merits 3 months' salary in lieu of notice, under clause 7 [ii] of the contract, which is allowed at Kshs. 141,279.

Pregnancy discrimination, unfair/constructive dismissal

58. In her Response and Counterclaim, the Respondent does not expressly state that she was discriminated against on account of pregnancy.
59. In her evidence in Court, she testified about her maternity leave taken in the year 2010. She spoke about her first baby, alleging that she was called by the Claimant to sign a letter, agreeing to reduction of her salary. She signed because she had no option. Her Colleagues did not suffer salary reduction. This pregnancy grievance is not part of her Counterclaim, and seems to have been advanced in Court, to render support to the Respondent's assertion, that the Claimant had a policy of discriminating against pregnant Employees.
60. The pregnancy discrimination subject matter of the Respondent's Pleadings, revolves around her second baby. She applied for maternity leave through a letter dated 20th August 2014. She testified she could not give the letter to anyone on this date as the School was in recess. She gave the letter in September 2014.
61. A Discharge Summary from Bomu Hospital shows she was admitted on 22nd July 2014 and discharged on 24th July 2014. She told the Court, and the Birth Notification supports that, her baby was born on 23rd July 2014.
62. The application for maternity leave came after the Respondent had been blessed with a second baby.
63. The Court has explored all possibilities of pregnancy discrimination surrounding the Respondent's second baby, and found none.
64. Section 29 [1] of the Employment Act entitles to pregnant Employees 3 months of maternity leave with full pay.
65. The right under Section 29 [1] of the Employment Act is exercisable only after the Employee has given not less than 7 days' notice to the Employer, or such shorter period as may be reasonable, of her intention to proceed on maternity leave, and on specific date she intends to return.
66. The Respondent was already on School vacation when she applied for maternity leave. She explains in her application that the baby came early, so she went on immediate maternity leave. She did not indicate when she intended to return. There was no room for the 7 day- notice to issue to the Claimant. Her leave, if immediate, would be effective the date she was admitted at Bomu Hospital on 22nd July 2014. But the Claimant was ready to go by the date of her maternity leave application 20th August 2014, advising her on receipt of the application, that she would be expected back on 20th November 2014.
67. Critically she wrote a letter of resignation during maternity leave. In fact, the letter was issued upon the Claimant around the same time application for maternity leave issued.
68. The Claimant wrote to the Respondent on 17th September 2014, after receiving the maternity leave application and the letter of resignation. It was pointed out to the Respondent that resignation notice was not proper. The Claimant also informed the Respondent that it expected the Respondent, to resume duty after completion of her maternity leave, or pay 3 months' salary in lieu of notice to the Claimant. The Claimant did not deny the Respondent her maternity leave entitlement. It was also pointed out in the letter that the Respondent had not issued the Claimant proper notice of her imminent maternity leave, at the time the School closed on 27th June 2014. The Respondent's assertion that she could not resume duty one month after delivery, is factually incorrect. She did not deliver in October 2014, but in July 2014. She was asked to report back at the end of her maternity leave of 90 days.
69. Pregnancy discrimination is very emotive subject, and on certain occasions, capable of being invoked by an Employee, to incite the mind of the Court against an innocent Employer. In the current dispute, the Court can think of no other reason for the Respondent to allege she was twice subjected to pregnancy-related discrimination by the Claimant, other than her endeavor to obfuscate her loan and notice obligation to the Claimant.
70. There is no evidence at all to suggest that the Respondent was unfairly/ constructively dismissed by the Claimant. The Respondent was not compelled to resign by the Claimant. The work environment was not made intolerable by the Claimant, to an extent that the Respondent was unable to continue discharging her teaching obligation.
71. She states in her letter that she resigned because of financial constraints and need for professional development. These are not circumstances that would constitute constructive dismissal.
72. Resignation was voluntary and the reasons for Respondent's decision were disclosed in her letter of resignation. Nowhere in her letter does she allude to any force exerted by the Claimant, in deciding to resign. The Claimant advised her, on receiving her letter of resignation, that it expected her to resume duty, at the end of maternity leave. The Claimant did not exhibit any intention, not to continue being bound by the contract concluded by the Parties. In ***Kenya Court of Appeal decision Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] e-KLR***, it was held that in constructive dismissal, the Employer's conduct must be so intolerable, that the Employee believes the Employer no longer intends to be bound by the fundamental terms of the contract between the Parties. Quite clearly, the Claimant in this dispute did not repudiate the contract, or intimate its intention not to continue with the contract to the end of the contract period. The Respondent resigned voluntarily, and specified reasons for her decision.
73. On cross-examination, she stated unequivocally that she resigned because she wanted to move to another School. She joined Jeffreys Academy, the same month of September 2014, the month which upon most of her grievances are founded. She moved to Jeffreys Academy to satisfy her professional development and cushion herself against financial constraints, as indicated in her letter of resignation.

74. The Respondent was not discriminated against on account of her pregnancy. She was not unfairly/ constructively dismissed. She is not entitled to compensation for unfair termination and damages for pregnancy discrimination. She does not merit exemplary damages.

Salary arrears

75. Under the first contract, the Respondent was promised a monthly net salary of Kshs. 65,000. She was paid in cash and cheque. She is shown in documents exhibited by the Claimant, to have received cash of Kshs. 25,451 and cheque of Kshs. 40,372- which would amount to the figure promised in monthly salary.

76. The Claimant seems to have structured its payroll to avoid tax, but that is not a matter before the Court. The misrepresentation of terms such as 'basic salary' 'net salary' could have been made with the advice of a tax consultant or tax cheat. Accountant Muiga alluded to the presence of such a consultant. Payroll administration was designed in such a way as to confuse tax authorities and avoid the full weight of tax burden. But the Claim herein is not a tax dispute. The dispute is between an Employer and its former Employee, in issue being whether salary was paid as agreed between the Parties. The Claimant was paid what was agreed, and accepted what was paid under the contract without reservation.

77. Subsequently her salary was reduced by 1/3. The reduction was consensual. There is a letter dated 3rd November 2010 from the Claimant to the Respondent, indicating that the Claimant was restructuring, and the Respondent would discharge 2/3 of her previous workload. Art lessons had been reduced.

79. She responded on 25th May 2011, accepting that her lessons were reduced due to unforeseen circumstances, and her salary reduced. She expressed her desire to have her contract renewed on the initial terms, but offered that if this was not possible, all her lessons are brought in the morning, to enable her venture into other income generating activities outside the Academy. The Parties had a meeting of minds on reduction of lessons and salary. It is unreasonable of the Respondent to turn around and allege she was underpaid her salary.

79. She signed the salary registers, reflecting the figures the Claimant states she was entitled to and was paid. It was not believable as suggested by the Respondent, that the salary registers were blank at the time she signed them, and filled up later by the Claimant, with a view to misleading the Court in the proceedings herein.

80. The claims for salary underpayment are clearly without foundation. The Respondent was paid in accordance with what was agreed, and acquiesced to subsequent variation of terms. The claims were only made after the Claimant demanded for payment of the loan balance and notice.

IT IS ORDERED:-

a. The Respondent shall pay to the Claimant car loan balance at Kshs. 86,000 and 3 months' salary in lieu of notice at Kshs. 141,279 – total Kshs. 227,279.

b. The Counterclaim is rejected.

c. No order on the costs.

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

Dated and delivered at Mombasa this 20th day of June, 2019.

James Rika

Judge