



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
PETITION NUMBER 34 OF 2018
IN THE MATTER OF: ARTICLE 41 AND 47 OF THE CONSTITUTION OF KENYA

AND;

**IN THE MATTER OF: THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS]
PRACTICE AND PROCEDURE RULES 2013**

AND;

IN THE MATTER OF: SECTIONS 5[2] [3], 17, 29, 31, 41, 43, 45 AND 49 OF THE EMPLOYMENT ACT 2007

BETWEEN

LUCY WANJIRU NYAGA.....PETITIONER

VERSUS

BATIMENT GROUP LIMITED.....RESPONDENT

Rika J

Court Assistant: Lawrence Osotsi

Omongo Onenga & Company Advocates for the Petitioner

Tito & Associates, Advocates for the Respondent

JUDGMENT

1. The Petitioner filed her Petition on 30th April 2018.
2. There are Affidavits of Service filed by Victor Otieno Odundo, a Court Process-Server, indicating the Respondent was served with the Petition, Mention Notice and ultimately, Hearing Notice.
3. The Respondent filed Memorandum of Appearance on 31st May 2018, but did not file any Response to the Petition.
4. On 9th October 2018, the Court ordered that the Petition is heard undefended.
5. Hearing was set for 3rd April 2019, during the Court's Service Week at Nairobi. The Respondent was notified through a Notice served on 11th March 2019. Service was acknowledged by Respondent's Advocates, but there was no attendance in Court by the Respondent or its Advocates on 3rd April 2019. Nothing was filed in Response even after the Hearing Notice was served.
6. The Petitioner gave evidence and rested her Petition, on 3rd April 2019. She filed her Closing Submissions on 10th April 2019.
7. She told the Court that she was employed by the Respondent as a Front Office Administrator, on 1st March 2017.

8. She earned a monthly salary of Kshs. 30,000. Her contract was terminated by the Respondent 9 months later, on 22nd November 2017.
9. The reason for termination was stated by the Respondent to be Petitioner's failure upon recruitment, to disclose pertinent issue to the Respondent.
10. The pertinent issue that the Petitioner was alleged to have failed to disclose, was that she was pregnant at the time she was employed.
11. She fell sick on 27th November 2017, and was admitted at Maria Immaculate Hospital. She gave birth the following day 28th November 2017. She was placed under observation until 12th October 2017, when she was discharged.
12. On 12th October 2017, she took the Birth Notification to the Respondent, and informed the Respondent she would be proceeding on maternity leave. In her oral evidence, the Petitioner's position is that she applied for maternity leave on 10th October 2017. Application was not approved.
13. She continued to make enquiries about her maternity leave in the month of October 2017. There was no response from the Respondent.
14. She was paid half –salary for the month of October 2017.
15. She consulted the Human Resource Manager on her employment status. He was unresponsive. She escalated her grievance to the Director. He told her it had been resolved by the Respondent that the Claimant's contract is terminated. She was sent the letter of termination dated 22nd November 2017, via e-mail.
16. Her probation period was over by the time of termination.
17. She sought the assistance of the Labour Office at Industrial Area Nairobi. It was not forthcoming. She instructed her Advocates to make demand to the Respondent for remedy before filing the Petition. There was no response from the Respondent.
18. The Petitioner urges the Court to find that she was treated discriminatively on account of her pregnancy, and order that she is paid **damages** under the Constitution. She also seeks **compensation** for unfair termination under the Employment Act 2007. Other prayers include:-
 - 1 month salary in lieu of notice at Kshs. 34,500.
 - Balance of salary for October 2017 at Kshs. 15,000.
 - Balance of salary for November 2017 at Kshs. 15,000.
 - House allowance at 15% of the basic salary for 9 months at Kshs. 40,500.
 - Pro-rata annual leave at Kshs. 20,898.
 - Maternity leave pay for 3 months at Kshs. 103,500.
 - Certificate of Service to issue.
 - Declaratory orders that refusal to approve maternity leave and withholding of salary during such leave is unconstitutional; and that the Respondent violated the Petitioner's rights under the Articles of the Constitution cited above.
 - Any other suitable orders.
 - Costs of the Petition.

The Court Finds:-

19. Section 29 [1] of the Employment Act entitles Female Employee to 3 months of maternity leave with full pay.
20. Subsection [4] states the right above, and other associated rights under Section 29, accrue only if the Employee gives the Employer not less than 7 days notice, or a shorter period as may be reasonable, of her intention to proceed on maternity leave on a specific date and to return to work thereafter.
21. In her oral evidence, the Petitioner told the Court she applied for maternity leave effective 10th October 2017.
22. At paragraph 20 of her Petition, she states she applied for maternity leave in September 2017.
23. She fell ill on 27th September 2017, and delivered on 28th September 2017. She was discharged on 12th October 2017 when she informed the Respondent that she would be proceeding on maternity leave.
24. This evidence does not establish that the Petitioner complied with Section 29 [4] of the Employment Act, so as to be entitled to maternity leave.
25. There is nothing on record showing she notified the Respondent, of her intention to go on maternity leave, on any particular day, and return to work at the end of her maternity leave.

26. The Court does not think that the Petitioner was discriminated against by denial of her right to maternity leave. She did not fulfill a basic statutory requirement, upon which exercise of her right, rested.

27. Her 6 months' probationary period lapsed at the end of August 2017. She was past the life of the probationary contract, at the time of termination. Although there was no letter confirming her in regular employment, there was no letter extending her probation either. The Court agrees that she was not on probation at the time of termination.

28. The Respondent states in the letter of termination, that the Petitioner did not disclose some pertinent facts, upon employment. The pertinent facts are themselves not disclosed in the letter of termination. The Petitioner holds the alleged nondisclosure on her part, related to her pregnancy. The Respondent felt the Petitioner should have disclosed she was pregnant.

29. Disclosure of pregnancy was not shown by the Respondent to have been a precondition for her employment. There is in general, no legal requirement for, or prohibition against pregnancy disclosure at the time one is employed. There are professions and industries, where the inherent nature of the work, requires through recruitment regulations and policies that pregnancy disclosure is made at the entry point. For an Employer to hold that the Employee should have made such disclosure, the Employer must have some legal or factual foundation to so hold. The Respondent ought to have shown that this was a requirement at the time of the interview, that the requirement was communicated to the Petitioner, and that the Petitioner failed to meet such requirement.

30. It is the reason given by the Respondent in its letter of termination, in justifying its decision, which establishes pregnancy discrimination. The Petitioner is unequivocal that the pertinent facts, stated in the letter of termination, were about her pregnancy. She established a *prima facie* case that the Respondent was referring to her pregnancy. As held in *GMV v. Bank of Africa Limited [2013] e-KLR*, once the Employee has established a *prima facie* case, the burden shifts to the Employer to show a legitimate explanation for termination. The Respondent needed to show that reference to pertinent facts, was not about Petitioner's pregnancy, but about some other legitimate reason, sufficient to justify termination. The Respondent did not show a legitimate explanation for its decision to terminate the Petitioner's contract.

31. The Court is satisfied that the Petitioner's contract was terminated because she was found to have been pregnant at the time she joined the Respondent.

32. Relying on the decisions cited by the Petitioner including *GMV v Bank of Africa*, and *Tracy Wangechi Mugambi v. Windsor Golf Hotel and Country Club [2019] e-KLR*, the Petitioner urges the Court to assess and award general damages for pregnancy discrimination under Article 23 of the Constitution. ***The Court is persuaded to grant this prayer at Kshs. 1,250,000.***

33. ***She is allowed the prayer for 1 month salary in lieu of notice, at Kshs. 30,000, under Section 36 of the Employment Act and clause 10 of her contract.***

34. ***The prayers for balance of salary for October and November 2017, are undisputed and granted at Kshs. 30,000.***

35. ***So is the prayer for pro-rata leave at Kshs. 20,898.***

36. The prayer for salary while on maternity leave is rejected on account of the Petitioner's failure to meet the requirement of Section 29 [4] of the Employment Act 2007.

37. Clause 4 of the contract describes the sum of Kshs. 30,000 payable to the Petitioner monthly, to comprise taxable monthly salary and allowances. Her claim to house allowance in arrears has no foundation and is declined.

38. The Petitioner worked for 9 months. Section 51 of the Employment Act allows Employees who have worked for a period of 4 consecutive weeks and above, to have Certificate of Service. ***The Respondent shall supply the Petitioner with her Certificate of Service forthwith.***

39. The Petitioner prays the Court to find termination was unfair and award compensation equivalent of 12 months' salary under the Employment Act.

40. The Respondent has not established valid reason justifying termination. The letter of termination alluded to failure to disclose pertinent issues, and also alleged that the Petitioner did not meet Management expectations. The expectations are not particularized. The Petitioner was not heard on any failure to meet expectations. Termination did not meet the statutory standards of fairness under the Employment Act. The Petitioner held a permanent position under her contract. She did not tell the Court for how long she expected to continue working for the Respondent. She worked for 9 months. She has been granted an order for damages under the Constitution. Taking these factors into account, ***she is allowed equivalent of 2 months' salary in compensation for unfair termination at Kshs. 60,000.***

41. ***Costs to the Petitioner.***

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

IN SUM, IT IS ORDERED:-

a) It is declared that the Respondent discriminated against the Petitioner on account of the Petitioner's pregnancy.

b) It is declared that termination of the Petitioner's contract was unfair.

c) The Respondent shall pay to the Petitioner: damages for pregnancy discrimination at Kshs. 1,250,000; notice at Kshs. 30,000; salary arrears at Kshs. 30,000; pro-rata leave at Kshs. 20,898; and equivalent of 2 months' salary in compensation for unfair termination at Kshs. 60,000 – total Kshs. 1,390,898.

d) Certificate of Service to issue.

e) Costs to the Petitioner.

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

Dated and signed at Mombasa this 3rd day of June 2019.

James Rika

Judge

Dated, delivered and signed at Nairobi this 14th day of June 2019.

Byram Ongaya

Judge