



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 828 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th June, 2019)

PAULINE WANJURU W.....CLAIMANT

VERSUS

KENYA MEDICAL RESEARCH INSTITUTE.....RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide the Statement of Claim filed on 18th May 2015 to challenge the termination of her employment services. She seeks the following reliefs:-

a. A declaration and finding that the Claimant's employment was wrongfully, unfairly and unlawfully terminated and that the said termination is null and void for all intents and purposes.

b. An order directing the Respondent to pay the Claimant her terminal benefits as stipulated below:-

- i. 1 month's salary in lieu of notice in the sum of KShs. 90,275.00.*
- ii. Leave days due (30/21 days x 10/12 x 90,275) in the sum of KShs. 107,470.25.*
- iii. 12 months salary for unfair termination (12 x 90,275) in the sum of KShs. 1,083,300.00.*
- iv. Severance pay (15/30 days x 90,275 x 2 years) in the sum of KShs. 90,275.00.*

TOTAL **Kshs. 1,371,320.25**

c. Damages for discrimination on account of marriage and pregnancy.

d. Costs and interest at Court rates from the date of filing this claim until payment in full.

e. Any other further or better relief that this Honourable Court may deem fit.

2. On 15th November 2010, the Claimant was employed as a Field Coordinator earning a gross salary of KShs.79,621.00. Her employment was confirmed at the end of her probation period and her salary later increased to KShs.90,275.00.

3. On 1st February 2012, the Claimant proceeded on maternity leave and was to resume work on 1st May 2012 but took an approved sick leave and was set to resume work on 30th May 2012. Nevertheless, vide the termination letter received on 18th May 2012, her employment services were terminated on account of redundancy.

4. The Claimant avers that she was not issued with a redundancy notice. Further, that as a result of the termination she suffered mental and financial anguish, being the sole breadwinner.

5. CW1 and the Claimant in this case, testified that she reported to Human Resource on 31st May 2012 as she had been directed and was

issued with a termination letter dated 17th May 2012. It was also her testimony that the reasons for termination as indicated in her letter were duration of study of project, funding availability and that the project had come to an end. She confirmed that she was paid gratuity and unpaid leave.

6. During cross-examination, she conceded that her contract renewal depended on availability of work and her performance.

7. The Respondent opposed the claim vide their Response filed on 23rd December 2015. They aver that the Claimant was dismissed on account of redundancy due to funding limitations in March 2012 that led to restructuring thus rendering the Claimant's position redundant. All employment contracts were subject to the availability of funds.

8. The Respondent contends that the Claimant's termination was purely on the ground of redundancy and not because she had taken maternity and sick leave.

9. In Grace Ndungu's witness statement dated 15th February 2018, she avers that the Claimant was paid final dues in the sum of KShs. 120,391.39 which was inclusive of gratuity, unutilized leave days and 1 month's salary in lieu of notice.

10. She also testified as **RW1** to the effect that the Claimant was under the KEMRI/CDC programme which was still running but with changing programmes. The Claimant's position was specifically for TB surveillance, which ended due to lack of funding. It was her testimony that the programme was stopped 2 months before the Claimant went on maternity leave.

11. During cross-examination, **RW1** testified that she had no evidence that the Field Coordinator position in Kisumu had been vacated or that there was funding limitation.

12. She further testified that the programme was a 6-year, 1-year renewal programme which was to be run for 6 years. She conceded that the Labour Officer was not informed of the impending redundancy.

13. Upon cross-examination, she maintained that the Claimant's position ceased to exist.

Submissions by the Parties

14. The Claimant in her written submissions dated 20th March 2019, submits that her employment was terminated unfairly and unlawfully as the procedure stipulated in Section 40 of the Employment Act was not followed. She relies on the case of **Addah Adhiambo Obiro Vs. Ard Inc. [2014] eKLR** where the Court held that Section 40 of the Act requires notification of the employees' union and the Labour Officer about an intended redundancy at least one month before the redundancy is effected, and **Irene Mwende Mutuiiri vs. Sen-Tech Limited [2017] eKLR** where it was held that Section 40 (1) is merely procedural by tenor and has to be read together with Sections 43, 45 and 47 (5).

15. She posits that she was issued with a termination letter the same day she sought an extension of sick leave upon completion of her maternity leave. It is her view that the reasons advanced for her termination were not valid because the Field Coordination work was still ongoing in respect of other diseases save for TB, for which she was engaged and it is her position that she was discriminated against on account of pregnancy.

16. The Respondent in its written submissions dated 25th April 2019, submits that the Claimant's termination was not based on discrimination on account of pregnancy.

17. The Respondent further submits that it complied with the provisions of Section 40 (1) (b), (e), (f) and (g). The Respondent relies on the case of **Kenya Airways Limited Vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court held that a redundancy is justified where the employer genuinely believed that there was a redundancy situation. It is its position that the redundancy was justified because funds to keep the project running became unavailable leading to the abolition of her position.

18. The Respondent further submits that the Claimant was compensated terminal dues in the sum of Kshs. 120,391.00 and since her contract was renewed annually, she was not entitled to further dues.

19. It is the Respondent's submissions that the burden of proving that discrimination took place, vests with the Claimant and relies on the case of **Irene Mwende Mutuiiri Vs. Sen-Tech Limited [SUPRA]**.

20. Further, they submit that for redundancy to be lawful it has to be substantially justified and procedurally fair as was held in the case of **Kenya Airways Limited Vs. Aviation & Allied Workers Union Kenya & 3 Others [SUPRA]**. They explain substantive justification to be in relation to the employer's situation that gives rise to valid grounds for redundancy while procedural fairness relates to compliance with Section 40 (1). They submit that they complied with the said provisions.

21. I have examined the evidence and submissions of the Parties. The issues for Court's determination are as follows:-

- 1. Whether the Claimant was terminated due to redundancy or for other reasons.**
- 2. Whether the termination was fair and justified.**
- 3. What remedies to award in the circumstances.**

22. On the 1st issue, the Respondent has averred that the Claimant was terminated on account of there being no funds to run the project she was working on as per the employment contract. That due to lack of funding, a restructuring was done which rendered the position of Filed Coordinator unnecessary leading to the termination of her employment in May 2012.

23. The Claimant's position is that she was targeted for termination when on maternity leave which is discrimination.

24. The Claimant annexed her appointment letter as Appendix PWWA. The letter dated 9-11-2010 indicated:-

“All contracts are subject to availability of funds, continuance of the position for which you were hired and satisfactory performance”.

25. The appointment letter was silent on termination and notice period. The Claimant completed her probation period and was confirmed accordingly.

26. Assuming that it was true that funding for the Respondent in the project Claimant was running had stopped, the Respondent still had to notify the Claimant of this position and give her ample notice to adjust her situation.

27. The Respondent avers that the funding of the project came to an end but they did not submit any evidence to prove this position. Infact the letter of termination never indicated that the funding of the programme run out.

28. The Claimant contends that her termination was due to her maternity condition because the programme she was working on continued to date.

29. Infact RW1 confirmed that there was no redundancy situation and that the funding programme KEMRI/CDC under which Claimant was working is still running though the programmes change.

30. In the absence of any evidence that the funding ceased for the Claimant's programme and that there was no redundancy situation, the only plausible explanation for the Claimant's termination was therefore due to her pregnancy. She was terminated while on maternity leave and even the letter of termination was delivered to her house.

31. Article 41 of the Constitution or fair labour practices was indeed flouted. The Claimant was indeed entitled to maternity leave as provided for under Section 29(1), (2) & (3) of Employment Act which states as follows:-

1) “A female employee shall be entitled to three months maternity leave with full pay.

2) On expiry of a female employee's maternity leave as provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.

3) Where:-

a) the maternity leave has been extended with the consent of the employer; or

b) immediately on expiry of maternity leave before resuming her duties a female employee proceeds on sick leave or with the consent of leave, the three months maternity leave under subsection (1) shall be deemed to expire on the last day of such extended leave”.

32. Section 5(3) of Employment Act 2007 also prohibits any form of discrimination against an employee and states as follows:-

3) “No employer shall discriminate directly or indirectly, against an Employee or prospective employee or harass an employee or prospective employee:-

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment’.

33. This coupled with Article 27 of the Constitution of Kenya 2010 also forbid discrimination on various grounds and Article 27(4) states as follows:-

“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”.

34. It is my finding that the Claimant was discriminated against on account of pregnancy on maternity status and that is why she was terminated while on her leave. I find the contention by the Respondent that the termination was due to funding cut off not true.

35. On the 2nd issue, the Claimant was served with a termination notice vide a letter dated 17/5/2012 on 18/5/2012. The termination took effect immediately. She was not given any notice nor given an opportunity to explain herself before the termination as expected under Section 41 of Employment Act 2007 which states 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".

36. In this Court's view, there were no valid reasons to warrant her termination nor was she given any fair hearing. The termination was therefore unfair and unjustified as provided for under Section 45(2) of Employment Act 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".

37. In terms of remedies, given the callous manner the Claimant was treated while on her maternity leave, I would find compensation on account of pregnancy and maternity status warranted.

38. I therefore award her compensation equivalent to the maximum 12 months' salary apt for the unfair and unlawful termination and the manner she was treated = $12 \times 90,275 = 1,083,300/=$.

39. I also award the Claimant costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 12th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties