



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2069 OF 2014

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

SYLVIE NIRERE.....CLAIMANT

-VERSUS-

M.A CONSULTING GROUP LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed her Memorandum of Claim on 19th November 2014. She avers that the Respondent denied her the statutory 3 months maternity leave and on 28th July 2014 she was terminated as a result of a review of her work performance despite the upward review of her salary. She avers that her termination was unfair and without justifiable cause and therefore seeks the following reliefs:-

i) A declaration that the Claimant's termination was unfair.

ii) A declaration that the Respondent breached the Claimant's right to equality and freedom from discrimination guaranteed under Article 27 of the Constitution by denying her the full 3 months' maternity leave as required in law.

iii) An order that the Respondent pay to the Claimant the sum of Kshs. 4,801.785 as quantified in the Memorandum of Claim.

iv) Damages for breach of the Claimant's right to equality and freedom from discrimination guaranteed under article 27 of the Constitution by denying her the full 3 months' maternity leave as required in law.

v) An order that the Respondent immediately release to the Claimant her Certificate of Service.

vi) Interest on item (iii) and (iv) above at Court rates.

vii) Costs of this suit.

viii) Any other remedy the Honourable court may deem fit to grant.

2. The Respondent filed its Defence and Counter-claim on 15th January 2015 in which it avers that the Claimant was on a fixed term contract which expired by May 2013. It further avers the Claimant consistently underperformed in her duties in breach of her contract of employment leading to the lawful termination of her contract of service and her dismissal on 28th July 2014.

3. The Respondent in its counter claim avers that it was entitled to a balance of 9 working days from the Claimant as she had taken 51 leave days between 10th July 2013 and 6th September 2013. Consequently, the Claimant owes the Respondent Kshs. 61, 363.80 (Kshs. 6,818.20 x 9 days).

4. In response to the counter-claim the Claimant denied owing the Respondent any monies and prays that the counter-claim be dismissed.

Claimant's case

5. The Claimant, CW1, testified that she was employed by the Respondent as an Associate Consultant vide a letter dated 5th February 2013 on a 3 year contract which would lapse in 2016, earning a salary of Kshs. 60,000 per month.

6. She testified that on 25th February 2013 she was issued with a letter of offer recalling the first letter, pending the issuance of a work

permit. She testified that the further letter of offer entitled her to maternity leave.

7. She testified that after the expiry of 3 months she got a work permit and was issued with another contract on 2nd July 2013 for a further period of 2 years. She testified the contract issued on 2nd July 2013 provided that she was entitled to a monthly salary of Kshs. 85,000 and a gratuity of 25% of her annual gross salary.

8. She testified that on 14th July 2013 she delivered a baby and she was given 1 month leave and was forced to resume duties in August 2013. She testified that the document recommended 74 days rest which she had utilised and thereafter resumed work.

9. She testified that she later entered into an agreement with the Respondent which provided that for 1 month she would work from 7.45 am to 1pm and work from home in the afternoon. It was the Claimant's testimony that upon resuming full duties her salary was reviewed to Kshs.150,000 per month effective 1st January 2014, this being an indication that she was doing a good job.

10. However, on 28th July 2014 she was issued with a letter ordering her to proceed on compulsory leave for 1 month pending review of her work performance. She testified that on 6th August 2014 she received a letter via email informing her that her contract had been terminated following review of her work performance.

11. She testified that she was not informed that she was to be taken for training to improve her performance. She testified that she was not paid her terminal dues.

12. In cross-examination, she testified that she delivered her baby on 14th July 2013 and that she had not gone on leave for 16 days.

Respondent's case

13. Joan Nekesa Barasa, RW1, testified that she has worked for the Respondent since 2007 and is a Personal Assistant to the Managing Director. She testified that the Claimant was employed in February 2013 and in July 2013, she was issued with a further contract for 2 years.

14. She testified that the Claimant had worked for one and a half years but she was dismissed for her performance. She testified that during the one year the Claimant constantly sought leave to work from home.

15. In cross-examination, she testified that there was no disciplinary process before the Claimant's termination. She testified that the company has a maternity policy, which provides that maternity leave is to apply when ready to go. It was her testimony that there was no performance contract between the Claimant and the Respondent and there was no report indicating that she was under performing.

Claimant's submissions

16. The Claimant submitted that the Respondent's argument that the first contract had expired does not stand since at the time of the termination there was a valid contract of employment.

17. She submitted that her contract provided conformed to Section 35 and 36 of the Employment Act. She further submitted that she was neither given any hearing by the Respondent to respond to any allegation of non-performance nor was she put on any performance appraisal system by the Respondent to determine that her performance was wanting or unmerited. She relied on the decision in **Yvonne Achitsa Odedere v Maseno University [2017] eKLR and Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR** where the Court held:-

"I agree with this opinion and add that an appraisal of the performance of an employee must of necessity involve active participation of the employee. A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. Even where there may be disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place. I therefore find that the comment made by RW1 to the effect that the Claimant's probation had been extended does not constitute an appraisal of the Claimant's performance. Consequently, I find that the Claimant's appointment was confirmed by default upon expiry of the two months' probation period set in the letter of appointment."

18. She submitted that maternity leave is a statutory right and having demonstrated that the Claimant was an employee of the Respondent at the time of pregnancy she was entitled to maternity leave for the entire duration of 90 days. Therefore, to deny the Claimant maternity leave is an act of discrimination against the Claimant.

19. She submitted that there is no provision barring one to go on maternity leave whether under probation, employed on contract or permanent and pensionable terms. They relied on the case of **GMV v Bank of Africa Kenya Limited [2013]eKLR** where the Court held:-

"The Employment Act under Section 5 [3] outlaws discrimination on the basis of pregnancy. Section 46 makes termination on the basis of a female employee's pregnancy, or any reason connected with her pregnancy, an automatically unfair decision. Remedies for such discrimination, under the Employment Act 2007, are to be found in Section 49 of the Employment Act 2007."

20. She submitted that she had established that there was unfair termination, breach of her constitutional rights and was discriminated against based on her pregnancy. She submitted that it is therefore only fair that the Claimant be granted the reliefs sought.

Respondent's submissions

21. The Respondent submitted that the Claimant was under a consultancy contract and that the Respondent's Managing Director varied her contract after realisation that the Claimant did not have a work permit that would have allowed her to be employed.
22. It is the Respondent's submission that Section 45 of the Kenya citizens and Immigration Act prohibits the Respondent from employing a foreign national whose status does not allow her to engage in employment. The Claimant was unemployable before obtaining the Work Permit.
23. The Respondent submitted that no action can be reasonable and legally founded on account of an alleged employment. It relied on the decision in **Holman v Johnson (1775) 1 Cowp 341** which was quoted in **Kenya Ports Authority v Fadhil Juma Kisuwa [2017] eKLR**.
24. The Respondent submitted that under Section 41 and in compliance with the section the process stated therein need not be conducted orally and that the exchange of correspondence does suffice. It relied on the case of **Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2010**. It urged the Court to find that from the letter by the Respondent to the Claimant, the Claimant clearly know what the complaint was and did not have to insist on an oral hearing.
25. The Respondent submitted that no sufficient evidence was provided by the Claimant to prove that she was discriminated against on account of her pregnancy. It argued that the Claimant did not apply for leave and that she avers that she delivered a baby on 14th July 2013 therefore she was not pregnant at the time of termination of her consultancy contract.
26. The Respondent further submitted that the contract allowed either party to terminate the contract upon giving of written notice, or pay in lieu of notice. It submitted that this position was fortified by the decision in **Joseph Ndambuki & 4 others v Del Monte Ltd [2012] eKLR** where the Court held the validity of termination at the will of the employer and Section 35 of the Employment Act which recognises the validity of termination on notice.
27. It submitted that maternity leave is an entitlement under Section 29 of the Employment Act but it must be triggered by some form of notification to the employer through a letter or memo and no such notification was made by the Claimant.
28. The Respondent submitted that the Claimant is not entitled to the reliefs sought as Clause 9 the letter of offer provided that no other expenses would be paid under the agreement except as agreed and that she was disentitled to gratuity payment under Clause 4 of the letter of offer as no gratuity would be payable if the contract was terminated by either side before the end of the 3 year period. In addition, the Claimant did not notify the Respondent of her desire or wish to proceed on maternity leave and that leave allowance could only be payable after completion of 12 consecutive months.
29. It is the Respondent's further submission that claim for service pay is unsupported by evidence of entitlement or period of employment and the Claimant's claim for the remainder of the contract is unsustainable pursuant to the express provisions of the contract.
30. The Respondent submitted that the Claimant's benefits including notice period shows that she still owes the Respondent the sum of Kshs. 61,368.80, which she never returned to the Respondent's office to satisfy the amount and to return the property of the Respondent in her possession.
31. I have examined all evidence and submissions of the Parties. The issues for determination are as follows:-
1. ***Whether the Claimant's contract was terminated or it expired.***
 2. ***If the contract was terminated, whether there were valid reasons for termination and if the Claimant was accorded a fair hearing.***
 3. ***What remedies to grant in the circumstances.***
32. On the 1st issue, from the records before me, the Claimant was offered a consulting renewable contract on 5/2/2013 for 3 years with effect from 1st February 2013 till 6th February 2016. The Claimant accepted the offer but the initial offer was recalled and she was offered a 3 months consultancy pending issuance of a valid work permit. The other terms of the contract remained valid.
33. On 2.7.2013, the Claimant was now offered yet another 2 year contract with effect from 1.8.2013 ending on 31.7.2015 and renewable by mutual agreement. Salary attached to this contract was 85,000/= per month and 25% of annual gross per year at end of 3 years of service. She was also entitled to 21 days off duty per year.
34. The Claimant's consultancy fees was reviewed on 1/1/2014 to 150,000/= per month. On 6/8/2014 however, the Claimant's employment was terminated on account of poor performance.
35. The Claimant was still on the contract which started on 1/8/2013 and was to end on 31.7.2015. From this fact, the averment by the Respondent that the Claimant's contract expired is not true as she was terminated almost 12 months before her contract i.e. 11 months and 23 days.
36. On issue No. 2, the Claimant was terminated ostensibly due to her poor performance. The Claimant denied any poor performance on her part. The Respondent have not submitted any evidence that the Claimant was under performing.

37. Section 43 of Employment Act 2007 states as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

38. Thus, when an employer alleges that the employee was performing poorly, the onus of proving this rests within him. The Respondent failed to do this.

39. Other than this, the Respondent failed to subject the Claimant to any disciplinary process as provided for 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".

40. In view of these findings, I find that the termination of the Claimant was unfair and unjustified as provided under Section 45(2) of Employment Act 2007 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".

41. In terms of remedies, I find for Claimant and award her as follows:-

1. Salaries for reminder of contract term being 150,000 x 11 months = 1,650,000/=

2. And 23 days/30 x 150,000 = 115,000/=

3. 1 month salary in lieu of notice = 150,000/=

4. Unpaid maternity leave of 53 days = 53/30 x 150,000= 280,000/=

5. Gratuity for 1 year = 25/100 x 1,800,000= 450,000

6. 6 months salary as compensation for unfair termination = 6 x 180,000= 900,000/=

TOTAL = 3,545,000/=

7. The Claimant is also entitled to costs and 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:

Ochieng Oginga holding brief Willis Otieno for Claimant – Present

Respondent – Absent