



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CASE NO. 23 OF 2017**

***(Before Hon. Justice Mathews N. Nduma)***

**EUCABETH AMONDI.....CLAIMANT**

**VERSUS**

**ONDIEKI JOHN PAUL.....1<sup>ST</sup> RESPONDENT**

**JAMES ORENGO ONDIEKI.....2<sup>ND</sup> RESPONDENT**

**SOLOMON ONDIEK.....3<sup>RD</sup> RESPONDENT**

**BERRYL ONDIEK.....4<sup>TH</sup> RESPONDENT**

**PHILIP BOB ONDIEK.....5<sup>TH</sup> RESPONDENT**

**TERESA OLUOCH.....6<sup>TH</sup> RESPONDENT**

**All t/a THE STEPHENS HOTEL LIMITED.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The claimant has sued the Six (6) named persons all trading as The Stephens Hotel together with the Seventh respondent, The Stephens Hotel Limited. The claimant states that she sued all from an abundance of caution as to the true ownership of the hotel.

2. The claimant seeks a declaration that her summary dismissal was unlawful and unfair and she be awarded maximum compensation for the unlawful and unfair dismissal. The claimant claims damages for discrimination on account of pregnancy and birth and terminal benefits including underpaid salary, house allowance; service pay in lieu of pension and payment in lieu of leave.

3. The respondents filed a joint statement of defence and deny that the identity of the Stephens Hotel is concealed.

4. They too deny that the claimant was a good worker and that they issued a letter of termination to the claimant.

5. They put the claimant to strict proof hereof.

6. CW1, the claimant testified under oath and told the court that she was presently without a job and lived in Kisii. That she was employed by the 7<sup>th</sup> respondent and the six named directors in June 2014 as a receptionist earning Kshs. 7,500 per month. That she got no letter of appointment. That she was promoted to Acting Manager in 2015. The previous manager was sacked. The claimant got a letter and notice to staff of her elevation which she produced before court dated 22<sup>nd</sup> April 2015.

7. The claimant worked until 31<sup>st</sup> May 2016. That she went on three months maternity leave from 28<sup>th</sup> December 2015. That she resumed work on 28<sup>th</sup> March 2016. She found a new manager and new staff. She was not assigned any duties. The manager told the claimant to await his instructions. CW1 called a Director by the name Dr. Paul (RW1) who then told CW1 to get instructions from the manager. The manager informed CW1 that she would clean rooms and utensils. CW1 proceeded to do that. She continued with work as daily instructed by the manager till 3<sup>rd</sup> May 2016. On the day the claimant was given a letter of dismissal by the manager with effect from 4<sup>th</sup> May 2016. The claimant was paid Kshs 20,000 and was wished success in the letter. This was two months salary. The letter was given to CW1 at 4.30 in the evening. The manager informed CW1 that the respondent did not have space for lactating mothers. That she would have no quality time to

work including overtime. CW1 instructed a lawyer and a demand letter was written to the respondent on the same day. The respondents did not answer the letter of demand. CW1 adopted witness statement dated 28<sup>th</sup> January 2018 as her further evidence in chief.

8. CW1 stated that the dismissal was unlawful and unfair. It was not for a valid reason and no fair procedure was followed. She was dismissed without notice and victimized for pregnancy and birth. CW1 said she nearly died of shock. She had a baby and no income to support her. She had done nothing wrong. She prays for compensation, damages and other reliefs set out in the claim.

9. That previous manager was paid Kshs. 35,000 and house allowance of Kshs. 6,000 yet she was only paid Kshs. 10,000 for the same job. She got no house allowance. She was not paid overtime. She reported to work at 7 am and worked until 11 p.m in the night most of the days. She was not given leave nor paid in lieu of leave. NSSF and NHIF was paid. She had no warning letter or any adverse record. She learnt of false accusations made against her in court. She got no show cause letter nor did she attend any disciplinary hearing. The charges were trumped up after the dismissal for cover up. CW1 denied having received cash from a customer. Payment was normally made at the reception yet she worked in the rooms. CW1 therefore denies the alleged false claims of theft. That she saw letter dated 3<sup>rd</sup> May 2016 in court for the first time. Under cross examination CW1 reiterated that Dr. Paul employed her but all named respondents dealt with her in course of work. That the respondents are based in U.S.A but come home occasionally. That the respondents are all Directors of the 7<sup>th</sup> respondent. That their names are written on the license of the hotel. She insisted that Joseph Ogutu the previous manager was paid Kshs. 35,000 and 6,000 house allowance. She insisted that the new manager, Teresa told CW1 that respondents had no space for lactating mothers. She denied she was dismissed for defrauding Kshs. 23,500. She admitted that she was paid Kshs. 20,000 upon dismissal and wondered if that would have happened if she had stolen as now alleged.

10. CW1 said she was summarily dismissed and given two (2) months salary. She states it ought to have been three months salary. CW1 stated that she was in possession of hotel records as Acting Manager and so she knows how much Ogutu was paid.

11. RW1 Dr. Ondiek John Paul testified under oath. He said that he lived in Daadab. That he was a beneficiary of the Stephens Hotel being son of Bishop Ondieki. That he was the 1<sup>st</sup> respondent. That the 7<sup>th</sup> respondent is the limited liability company that owned the hotel. That it was formerly called Savanna Hotel Kisii. RW1 was not sure if it was just a business name then. That RW1's step mother sold the hotel to one Dr. Taylor a medical Doctor and businessman whilst the claimant worked there. That the sale was fraudulent using false letters of Administration. The sale was nullified.

12. The name was then changed to Stephens Hotel. The claimant worked as cashier. RW1 dismissed the manager and employed CW1 as acting manager. That she earned Kshs. 6,500 prior to the promotion. She had served 2-3 years by then. That she earned Kshs. 10,000 a month as acting manager. The hotel had five (5) rooms and was not meeting its own costs. That RW1 paid salaries from his pocket. RW1 replaced the claimant with Teresa Aluoch and the claimant returned to her previous position of cashier. The hotel increased its revenue upon this change.

13. That CW1's employment came to an end upon her return from maternity leave. CW1 was given show cause letter and she just disappeared after that. CW1 did not respond to it. That other respondents were brothers and sister of RW1 who live in U.S.A. That they have not been in Kenya for over 20 years. They were not involved in running the hotel. They are however beneficiaries.

14. RW1 denied that CW1 was dismissed for being a lactating mother. That she was given maternity leave of 3 months. That Teresa had since left the hotel. Under cross-examination, RW1 insisted that the claimant got a show cause letter dated 3<sup>rd</sup> May 2016. That she was never issued a letter of termination dated 3<sup>rd</sup> May 2016. RW1 said he has never seen the letter. RW1 said money had disappeared and Teresa had discussed the issue with CW1. RW1 said he was not directly involved in hotel management. There were no minutes of alleged discussion with CW1. RW1 said that the company lawyer responded to the letter of demand though letter was not before court. RW1 insisted that the claimant absconded upon being issued with show cause letter on 3<sup>rd</sup> May 2010. RW1 said he worked in Nairobi whereas the claimant was based a Kisii. RW1 said the company had no pay slips but CW1 was paid via a bank account.

### **Determination**

15. The issues for determination are:

- (a) Whether the claimant absconded from work or she was summarily dismissed by the respondent.
- (b) If answer to (a) is in the negative whether the respondent had a valid reason(s) to dismiss the claimant and if fair procedure was followed.
- (c) Whether the claimant is entitled to the reliefs sought.

### **Issue (a)**

16. From the record, the proper respondent in his matter is the 7<sup>th</sup> respondent being a limited liability company. There was no basis for suing the 1<sup>st</sup> to 6<sup>th</sup> respondents. The 1<sup>st</sup> to 6<sup>th</sup> respondents are struck-off as respondents in this suit.

17. It is clear from the evidence before court not in dispute that the respondent replaced the claimant as acting manager with one Teresa, whilst the claimant was on maternity leave.

18. It is also clear that the claimant was removed from cashier and reduced to a cleaner of rooms upon her return.

19. There is no doubt that the claimant was dissatisfied with this new arrangement and sought explanation from RW1.

20. The court is satisfied that this was a ploy to get the claimant to leave work. The claimant however did not leave but obeyed instructions to be a cleaner. This frustrated the respondent who then summarily dismissed the claimant and paid her Kshs. 20,000 in lieu of two months notice.

21. The claimant dissatisfied with the dismissal went to her advocates who wrote a demand letter on the same day being 4<sup>th</sup> May 2016.

22. The aforesaid evidence is not consistent with allegation that the claimant had absconded from work. It is not in dispute that indeed she was paid Kshs 20,000 terminal benefits. The evidence by RW1 is inconsistent with this undisputed fact and is at best incredible.

23. The court believes the claimant that the notice to show cause for theft of Kshs. 23,000 was introduced as an afterthought and in court to boost the defence case and that the claimant only saw the letter for the first time in court. This testimony by the claimant is collaborated by the letter of demand dated 4<sup>th</sup> May 2016 which did not refer to any charges being made against the claimant and which letter was evidently not responded to by the respondents.

24. The court believes that the claimant was replaced by Teresa Aluoch solely for the reason that she was pregnant, had given birth and was perceived not able to dedicate maximum time to the hotel. Teresa Aluoch was not summoned to rebut the testimony by CW1.

25. Accordingly, and in answer to issues (a) and (b), the claimant did not abscond from work but was dismissed from employment by the respondent for no valid reason. Indeed the conduct by the respondent amounted to discrimination on grounds of pregnancy and giving birth. The court believes the testimony by CW1 that Teresa told her that the respondent did not have space for lactating mother and that she would not be able to give quality time to the respondent.

26. The court relies on the case of *GMV vs Bank of Africa (K) Ltd (2013) eKLR* to find that the conduct by the respondent was unlawful and unfair and would attract general damages in favour of the claimant to be awarded by the court. That the said general damages are not necessarily separate from the statutory compensation for the unlawful and unfair dismissal.

27. The claimant was not subjected to any hearing at all prior to the dismissal and therefore the respondent violated *Section 36, 41, 43, 45 and 46 of the Employment Act 2007*. In addition to violation of *Section 5 of the Act*, which prohibits discrimination at the work place on grounds set out therein including gender and pregnancy.

#### **Issue (c)**

28. As to the reliefs sought by the claimant, the court finds as follows:

#### **Notice Pay**

29. The claimant was paid two months salary in lieu of notice and therefore is not entitled to additional payment in lieu of notice.

#### **Underpayment**

30. The claimant has not sufficiently proved that she was entitled to payment of a salary exceeding Kshs. 10,000 per month. The claimant had accepted the salary offered to her and there is no basis for the court to grant her any additional salary not provided for in the contract of employment.

#### **Gratuity**

31. The claimant was a registered member of NSSF and has therefore not proved that she was entitled to payment of service gratuity upon termination. The claim lacks merit and is dismissed.

#### **Payment in lieu of leave.**

32. The claimant did not prove which period she had not taken leave. The claim in lieu of leave has not been proved and is dismissed.

#### **Damages for discrimination**

33. The claimant has proved that she was dismissed on the basis that she was a lactating mother and could therefore not provide quality time to the hotel. This is discrimination in violation of *Section 5 of the employment Act*, and also constitutes unfair labour practice in terms of *Article 41 of the Employment Act*. The conduct by the respondent is also a violation of the right of the claimant against discrimination protected under *Article 27(4) of the constitution of Kenya 2010*.

34. Accordingly, going by the GMV case and CUEA case in which the court awarded Kshs. 3 Million and 5 Million respectfully for discrimination, the court awards the claimant Kshs. 1 million for discrimination on grounds of pregnancy and giving birth.

35. In addition, the claimant's employment was terminated for no valid reason and without following a fair procedure and is entitled to compensation of up to the equivalent of 12 months salary in terms of *Section 49(1) (c) and (4) of the Employment Act*. This is a case on the

facts which would have attracted the maximum compensation of the equivalent of 12 months salary for termination on the basis of pregnancy and birth; non contribution to the termination; degrading conduct towards the claimant by forcing her to become a cleaner from acting manager with the aim of getting rid of her; her long career prospect as a manager of the respondent; the shock experienced by the sudden dismissal while having a young baby and no alternative income; false accusation of theft after the fact and that no compensation was paid to the claimant for the loss of job.

36. The court however considers the award of Kshs. 1 Million to constitute a global award to mitigate the loss and suffering by the claimant.

37. Accordingly, in the final analysis, the claimant is awarded:

(a) Global damages for discrimination on grounds of pregnancy and birth and unlawful and unfair loss of employment in the sum of Kshs. 1 Million (1,000,000).

(b) Interest at court rates from date of judgment till payment in full.

(c) Costs of the suit.

**Judgment Dated, Signed and delivered this 11<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. O.M Otieno for Claimant.

Mr. Orengo for Respondent

Chrispo – Court Clerk