



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 175 OF 2014

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF SUGAR PLANTATION & ALLIED WOREKRS.....CLAIMANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant union filed suit on behalf of the grievant Brenda Otunga Wapopa.
2. The claimant testified in court as CW2 and stated that she was employed by the respondent in 2011 as a weight bridge clerk. That she was then deployed to the insurance office as a permanent employee. Initially she was a casual employee earning Kshs. 9, 000 per month.
3. As at 2013, the grievant earned Kshs. 23,815 and had a good work relationship with her supervisor. After serving the insurance office for about five (5) months, in November 2013, the grievant was verbally transferred to the technical office to relieve the secretary named Gertrude who had been transferred to the Agricultural department.
4. CW2 served in that office for about five (5) months up to May 2014 and was transferred back to the insurance office. Upon her return, the supervisor at the insurance office Mrs. Margaret Osogo told CW2 that she did not want her back because the office had moved to a higher standard of work and CW2 could not cope. CW2 was pregnant at the time. CW2 went to the Human Resource office and explained her predicament. CW2 was told to report to the time office before the matter was resolved. CW2 complied in May 2014. The grievant was served with a show cause letter dated 15th May 2014.
5. The grievant was accused of having failed to meet training objectives and expectations while working as a casual weight bridge/fuel clerk
6. That upon deployment to the Technical Office, CW2 was said to have failed to perform assigned duties and responsibilities.
7. She was informed that respondent intended to terminate her employment contract as insurance clerk and was to show cause in 48 hours why her employment ought not to be terminated. The letter was written by Human Resource and Administration Manager Mr. Michael Mechemo and Sohan K. Sharma, financial controller.
8. The letter which prompted the show cause letter dated 9th May 2014, by Margret Osogo, Insurance office stated that she was not willing to take the grievant back because she was removed from the insurance office before she had completed her probation and had been away for over 5 months. That the insurance office had moved to another level of performance and delivery and she was certain that CW2 would not be able to adjust let alone cope with the current pressure of work. *“Besides, you are aware that she is due for maternity leave any time from now. That will be very detrimental to the operations of our office. It will not be prudent to suggest that she comes back at this point in time. We need a vigorous active man who is able to keep up with the rigorous work in our office not to mention the time consuming duties that relate to Hospital admissions and work related injuries”*
9. This was the recommendation of this lady, Insurance Officer, Margret Osogo against her fellow expectant lady who was about to embark on maternity leave. The show cause letter was written a week later threatening to terminate the employment of CW2 due to poor work performance. CW2 had on 10th May 2014, written to the Human Resource office requesting for support upon being rejected by Margret Osogo at the insurance office. Indeed, it is the same Margret Osogo who had recommended training of CW2 as Insurance clerk/Registry clerk/Medical Assistant/Data entry clerk. Margret Osogo in her letter of recommendation dated 15th June 2013, had recognized that CW2 had a bit of insurance background. CW2 testified that she requested for time to respond to the show cause letter and for documentation elaborating allegations made against her. The respondent did not provide the requested documentation. On 19th May 2014, CW2 responded to the show cause letter stating that on 1st April 2013, she had voluntarily offered her services to the insurance office in order to acquire knowledge and skills. That she worked well, and did not get any adverse report from that office. That Mrs. Osogo moved her permanently

to that office having been impressed with her work. Mrs. Osogo advocated for CW2's confirmation which was done on 16th September 2013.

10. That CW2 testified that she never received verbal or written indication that her work at the insurance office and in the technical office was wanting. That she moved to technical office temporarily to relieve the secretary. That the transfer had nothing to do with any failure on the part of CW2, she added. She later got a letter of transfer back to her previous insurance office. This had nothing to do with her performance. CW2 expressed shock at the turn of events upon her return to the insurance office on 10th May 2014.

11. CW2 stated in her explanation that these sudden allegations of poor work performance, were false, baseless and malicious aimed at ruining her life. CW2 testified that, she then received a letter of termination of employment written by Michael Mechuno, Human Resource and Administration Manager on 20th June 2014.

12. The letter simply states that *"Management has reviewed your work performance over the past months and is not satisfied with the achievements you have made so far. Your performance and delivery on your key duties and responsibilities have not measured to the company's expectations"*

13. CW2's employment was terminated in terms of Section 44 (4) (c) of the Employment Act, 2007. CW2 was not given notice of termination. It took effect immediately. It was indeed a summary dismissal, CW2 testified. CW2 testified that her job, and means of survival was taken away when she needed it most. She was pregnant and about to deliver. She had other children to support. CW2 said she was psychologically tortured. She prayed for damages for the unlawful dismissal. CW2 stated that she did not desire to be reinstated back to her job.

14. CW2 was closely cross examined by Mr. Oledo Advocate for the respondent. She was consistent in her responses regarding her history with the respondent. That she joined the respondent as a volunteer. Was taken up permanently due to her good performance. She served two different departments. She never received any adverse record on her performance until she was suddenly rejected by Margret Osogo upon being recalled back to the insurance department. CW2 stated that she had not been replaced at the insurance office. They were three staff before and only two were there upon her return on 9th May 2013.

15. CW2 insisted that she was rejected by Margret Osogo because she was pregnant. That Mrs. Osogo wrote that she could therefore not cope with the demands of the insurance office any more. That she needed a strong man to cope with the new dynamics at the office.

16. CW2 stated that she was called to appear at a disciplinary hearing on 19th June 2013 and received the letter of termination dated 20th June 2013.

17. The advocate for the respondent put it to CW2 in court;

"You could not do your duties when pregnant. It was too much. Your productivity was low"

CW2 testified that she was okay and that she suffered after termination. She said she was pregnant and had no money. She concluded that she wanted damages and not reinstatement. That she was now a fruits vendor.

18. RW1 was Dennis Adika, the Human and Administration manager of the respondent from February 2017. RW1 stated that he was not working for the respondent whilst CW2 was there. RW1 relied on the records in the file of CW2. That RW1 relied on a witness statement dated 28th May 2018 and list of documents filed on 6th June 2016, which he produced as exhibits '1' to '12'.

19. RW1 stated that CW2 was dismissed from work for poor work performance and could not cope due to work pressure.

20. RW1 was cross examined by Advocate for the claimant. He stated that at the time of termination CW2 earned Kshs. 27,387. When pressed to provide any evidence of underperformance of CW2, RW1 stated that CW2 had complained on 12th September 2013 that the work load was too much. RW1 confirmed that the letter dated 12th September 2013 was written by the claimant before she was permanently employed on 16th September 2013.

21. RW1 relied on the letter written by Margret Osogo on 19th May 2014, in which she rejected CW2's transfer to the insurance office as evidence of underperformance. RW1 stated that he was not sure if the insurance office was aware that CW2 was pregnant at the time. RW1 denied that pregnancy was the cause for her rejection at the insurance office, upon being shown comments by Margret Osogo that "pregnancy would be detrimental" RW1 admitted that Mrs. Osogo wanted a man to replace CW2. RW1 stated that CW2 was invited to a disciplinary hearing on 20th June 2014 but she did not turn up. RW1 stated that CW2 had responded to the show cause letter. RW1 stated that the employment of the claimant was terminated the same date being 20th June 2014. RW1 added that CW2 had not completed one year in service and so was not entitled to annual leave.

22. RW1 stated under re-examination that the hearing notice was received at 4 pm on 19th June 2014 asking her to attend the disciplinary hearing the following morning at 10.00 am. RW1 stated that the notice was short. That CW2 Appealed for the extension of time of the hearing by a letter dated 20th June 2014. That the letter was received at 11.14 am. After the hearing time had lapsed. That the hearing proceeded in her absence. That the letter of termination was written on the same day the 20th June 2014.

Determination

23. The issues for determination are:

- (a) Whether the termination of the employment of CW2 was for a valid reason and followed a fair procedure.
- (b) Whether CW2 is entitled to the reliefs sought.

Issue (a)

24. CW2 lost her employment by a letter dated 20th June 2014 which cited poor work performance, poor attitude towards work and laxity that impacted negatively to the overall sectional performance targets. CW2 testified that she had joined the respondent as a volunteer worker at the weighbridge section as a clerk. That her work was noticed by one Margret Osogo who quickly recommended her for training and employment in the insurance department. That CW2 served the insurance department for about 5 months and her performance and relationship with staff and her supervisor was good. That CW2 was transferred to the technical department to relieve a secretary. That she performed that work for 5 months until she was asked to return to her substantive office in the insurance department.

25. That all this time she had never received a single complaint regarding her work. That she was shocked to see a letter by Mrs. Margret Osogo in which she refused CW2 to return to her office on the basis that the insurance office had moved to a higher standard and CW2 could no longer cope with the demands of work in the insurance office especially because she was pregnant and about to go on maternity leave and that Mrs. Osogo needed a strong man to occupy her place to discharge effectively the mandate of the insurance office.

26. Following this letter CW2 received a show cause letter for alleged poor work performance. CW2 promptly responded to the show cause letter stating that the allegations of poor work performance were false. That they have never been raised before and this was a malicious ploy to ruin her life.

27. This notwithstanding she was on 19th June 2014 at 4 p.m given a notice to attend a disciplinary hearing at 10.00 am the following morning on 20th June 2014.

28. That CW2 wrote an appeal for more time and delivered the same to the respondent receipt of which was acknowledged by RW1. Notwithstanding the Appeal, the hearing proceeded in her absence and her employment was terminated with immediate effect on the 20th June 2014.

29. RW1 was largely unable to rebut the candid and credible evidence by CW2 as to the events that led to the termination. RW1 had no personal knowledge of the allegations made against CW2. The court was not told why Margret Osogo or any other employee who dealt with CW2 was not called to refute the testimony by CW2.

30. The court is satisfied from the testimony by CW2 and documentation produced by RW1, especially the letter written by Mrs. Margret Osogo that Margret Osogo rejected CW2 to continue serving in her substantive position at the insurance office for the reasons that she was pregnant and about to go on maternity leave and therefore could no longer cope with the work demands of that office. Mrs. Osogo made it clear that a strong man was needed to perform the insurance work CW2 performed. This rejection prompted the show cause letter with false allegations of poor work performance which had not been made at all earlier.

31. Clearly, CW2 was discriminated upon for reasons of being pregnant and about to go on maternity leave. No appraisal report was placed before court to show that the performance of CW2 was wanting at the insurance office, at the technical office and even as a volunteer at the weighbridge.

32. Section 5 of the Employment Act, 2007 provides:

“(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”

33. This provision has been buttressed under Article 41 of the constitution of Kenya 2010 which introduced the doctrine of “fair labour practices” not known before in our employment law by providing:

“41(1) every person has the right to fair labour practices.

34. Furthermore, Article 28 of the constitution provides:

“Every person has inherent dignity and the right to have that dignity respected and protected”

35. The grievant pleaded under paragraph 8 of the memorandum of claim that the criteria used to summarily dismiss her was ‘malicious and unreasonable’ She particularized this conduct to include:

“(a) Terming employee to be ‘less vigorous’ on the basis of being expectant which is sexist and gender insensibility.

(b) *Demonizing natural pregnancy.*

(c) *Being cruel, oppressive and irrational contrary to existing labour laws and new constitution”*

36. The essence of discrimination, unfair labour practice and violation of the human dignity of CW2 was well captured in these pleadings and in the vivid testimony by CW2 before court. The evidence by CW1, the union official corroborated the testimony of CW2 regarding abuse and discrimination by.

37. The claimant relied on the **Industrial Court at Nairobi cause No. 2177 of 2012 Maina Mwangi vs Thika Coffee Mills Ltd** in which Rika J. opined:

“Where employee fails to meet the standard, the first duty of the employer is to let the employee know that his performance has fallen below the set standards. The employer should then propose training, guidance and fresh instructions to the employee. The employer is required to allow the employee time to improve. If no improvement is noted after a reasonable passage of time, the employer should issue a formal warning to the employee, and advise the employee he may be separated from the employer on account of poor performance”

38. The claimant further relied on the case of **GMV vs Bank of Africa Kenya Limited Industrial court at Nairobi Cause N. 1227 of 2011** in which Rika J. relied on *Section 5(6) of the Employment Act* which provides:

“In any proceeding where a contravention of Section 5(3) is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission is not based on any grounds, specified in this section”

39. In this suit CW2 has adduced oral and documentary evidence that she was discriminated on grounds of pregnancy. The respondent has dismally failed to discharge the burden of rebuttal placed on it under *Section 56 of the Act*. The claimant has proved on a balance of probabilities that indeed she was discriminated on grounds of pregnancy and gender.

40. In the case of GMV (Supra), Rika J. awarded the claimant Kshs. 3,000,000 composite general damages for termination of service based on her pregnancy in addition to an award of proved terminal benefits including salary in lieu of notice, service gratuity and payment in lieu of leave not taken.

41. In the present case, the claimant prayed for reinstatement to her job without loss of benefits but in her testimony prayed for damages in lieu of reinstatement.

Issue (b) - Remedy

42. The remedy available to CW2 in this case is reinstatement to her job from date of dismissal without loss of income to date. However, due to passage of time the reinstatement may not be tenable, since more than three years have elapsed from the time of dismissal. The court is persuaded by the Authority in GMV case Supra, to award in the alternative general damages to CW2 in the sum of Kshs. 3,000,000 for discrimination on the basis of pregnancy that resulted to the unlawful summary dismissal of the claimant.

43. CW2 is also awarded one month salary in lieu of notice in the sum of Kshs. 27,387.

44. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

- (a) General damages for discrimination on the basis of pregnancy resulting in summary dismissal of CW2 in the sum of Kshs. 3,000,000.
- (b) One month salary in lieu of notice Kshs. 27,387.
- (c) Interest at court rates from date of judgment till payment in full.
- (d) Costs of the suit.

Judgment Dated, Signed and delivered this 18th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Boniface N. Mulomi for the Claimant Union

Mr. Olendo for Respondent.

