



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 484 OF 2017**

**BETWEEN**

**LILIAN BAHATI MLEWA.....CLAIMANT**

**VERSUS**

**NAMJI CLEARING AND FORWARDING COMPANY LIMITED....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Stephen Jumbale & Company Advocates for the Claimant*

*Khalid Salim & Company Advocates for the Respondent*

---

**JUDGMENT**

1. The Claimant filed her Statement of Claim on 20<sup>th</sup> June 2017. She states, she was employed by the Respondent as a Receptionist, around 1<sup>st</sup> January 2012. The Respondent terminated her contract on 28<sup>th</sup> February 2017, on the ground that she had a young baby, and would therefore not be able to cope with her work. She was not given notice, or a hearing. At the time of termination, she earned a monthly salary of Kshs. 15,000. She asks the Court to declare that termination was unfair and award her compensation equivalent of 12 months' salary at Kshs. 180,000; costs; and interest.

2. The Respondent filed its Statement of Response on 21<sup>st</sup> August 2017. Its position is that the Claimant applied for the position of Receptionist on 18<sup>th</sup> January 2012. She was employed on 1<sup>st</sup> February 2012. She was habitually late for duty. She neglected her work. She was warned severally. As a Receptionist, her lateness and neglect greatly inconvenienced the Respondent. She was called by Respondent's Director Yusuf in January 2017, as asked to explain herself. She failed to do so, and was warned. She did not change and as a result, her contract was terminated. She was paid terminal dues, and supplied with her Certificate of Service. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified, and rested her case, on 31<sup>st</sup> July 2018. Operations Manager Aidah Ngina Katua testified on 22<sup>nd</sup> July 2019. The Cause was last mentioned on 20<sup>th</sup> September 2019 when Parties confirmed filing of their Submissions.

4. The Claimant adopted in her evidence, her Witness Statement on record, affirming that she was employed by the Respondent as a Receptionist. She was called by her boss on 20<sup>th</sup> June 2017, and told there was no more work. There was no notice and no reason, or reasons given explaining the decision. She was just told to go home and look after her baby. She had just come from maternity leave. Cross-examined, she told the Court she has not asked for notice pay. She was not persistently late for work.

5. Katua confirmed that the Claimant worked for the Respondent as a Receptionist, beginning at the start of 2012, ending in mid- 2017. Her contract was terminated by the Respondent on account of gross misconduct. She gave birth at the end of 2016. She used to report to work late after this. Respondent's door was electronic. Someone had to open it. There was confusion in her absence. Reporting hour was 8.00 a.m. The Claimant would report at 9.00 a.m. Katua told the Court that the Claimant had a miscarriage in 2015, and started behaving 'funny' after this. Katua was Claimant's friend. She counseled the Claimant. She encouraged the Claimant, who lived quite near the place of work, to report early. The Director Yusuf similarly counseled the Claimant. The Respondent did not wish to lose the Claimant. It is not true that her contract

was terminated because she had a baby. The Respondent had 5 other Employees with babies. They are still working. The Claimant was given reasonable opportunity to correct her attitude.

6. Cross-examined, Katua told the Court she does not work in the human resource section. Termination was on account of gross misconduct, specifically, lateness for work. There was no evidence presented before the Court supporting the claim of lateness. There were no minutes of meetings held with the Claimant on any allegation made against her. It is true that the Claimant had a baby at the material time. She did not seek permission from the Respondent to be with her baby and to come to work late. Redirected, Katua told the Court that Yusuf gave a specific reason to the Claimant for termination- lateness.

**The Court Finds:-**

7. There is a Certificate of Service exhibited by the Respondent showing that the Claimant was employed by the Respondent as a Receptionist, from 1<sup>st</sup> January 2012 to 28<sup>th</sup> February 2017. There ought to be no dispute about the date of employment and termination, in light of this Certificate which issued upon the Claimant.

8. The issues in dispute are whether termination was unfair; and whether the Claimant is entitled to compensation for unfair termination, costs and interest.

9. The Claimant states she was told to go home and look after her baby. She had just returned from maternity leave. She holds that termination was on account of her having a baby. The Respondent's position is that the Claimant's contract was terminated on account of her persistent lateness to work. Her lateness affected Respondent's business, given that the Claimant was the Receptionist.

10. The Court is not able to agree with the Claimant, that termination was on account of her motherhood. There is evidence that the Respondent had accommodated the Claimant before, during and after her pregnancy. There are leave passes exhibited by the Respondent, showing the Claimant would apply for, and was invariably allowed time off, to attend to her pregnancy. She was on maternity leave from October 2016. She was similarly allowed time off to attend to other family functions. She was supported financially by the Respondent, in her domestic requirements. There is no reason why the Respondent would change, after the Claimant had a baby.

11. What seems to the Court to have happened is that the Claimant was slowed down by the need to look after her baby. Having exhausted her maternity leave, she does not seem to have balanced the demands of motherhood with those of her work. She did not report on duty on time, as demanded by the nature of her work. The Court finds the evidence of the Respondent, that, the Claimant persistently reported to work late, plausible. The Claimant did not take it into account that she had been away on maternity leave for 3 months, and away on other days, and apply herself fully to her work, on returning from maternity leave.

12. The Claimant had the liberty of seeking flexible working hours from the Respondent. The Respondent had accommodated her during her pregnancy. The Claimant should have engaged the Respondent and asked for flexibility in her work schedule, instead of reporting late, and inconveniencing the Respondent and its clientele. She has not shown that she was subjected to pregnancy-related discrimination. Other Women working for the Respondent had been blessed with babies, and were never victimized by the Respondent. Employees who enjoy paternity and maternity leave ought to focus on their assignments once they are back in office, and balance fairly, the demands of parenthood, with the demands of their Employers. While cross-examining Katua, Claimant's Advocate asked whether the Respondent was aware that the Claimant had a young baby. The suggestion was that having a young baby gave the Claimant a freehand on reporting hours. The Court does not think that motherhood should deprive businesses of full and productive labour, expected from Employees. The Claimant ought to have consulted the Respondent if there was to be a change in her reporting hours. There was a valid and fair reason in termination of Claimant's contract.

13. This cannot be said of procedure. There was no disciplinary hearing extended to the Claimant. There were no minutes of any disciplinary meeting placed before the Court. There is no evidence of any letter from the Respondent to the Claimant, asking her to show cause why, she should not be disciplined for lateness. The Respondent owed the Claimant an obligation to execute termination decision, fairly and reasonably. There was failure on the part of the Respondent, in observation of Sections 41 and 45 of the Employment Act. To this extent, termination was unfair.

14. The Claimant had worked for a complete 5 years. The Respondent described her in the Certificate of Service as hardworking and dedicated. The Respondent would not, in spite of her shortcomings, hesitate to recommend the Claimant to another Employer. The Claimant was on an indeterminate contract, and expected to go on working for the Respondent. The Court has taken into account that the Claimant contributed to the circumstances leading to termination of her contract. ***She is granted equivalent of 5 months' salary in compensation for unfair termination at Kshs. 75,000.***

15. ***No order on the costs.***

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

IN SUM, IT IS ORDERED:-

***a) Termination was based on valid reason, but executed unfairly.***

***b) The Respondent shall pay equivalent of 5 months' salary to the Claimant in compensation for unfair termination, totaled Kshs. 75,000.***

***c) No order on the costs.***

*d) Interest allowed at 14% per annum from the date of Judgment till payment in full.*

**Dated and delivered at Mombasa this 18<sup>th</sup> day of October 2019.**

**James Rika**

**Judge**