



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1234 OF 2015

VELLA NJERI KIMATHI.....CLAIMANT

VERSUS

ERICSSON KENYA LIMITED.....RESPONDENT

JUDGMENT

1. Vella Njeri Kimathi (Claimant) instituted legal proceedings against Ericsson Kenya Ltd (Respondent) alleging unfair termination of employment, breach of contract and discrimination.
2. In its *Response*, the Respondent contended that the Claimant's employment was terminated lawfully on account of redundancy, and allegations of discrimination and breach of contract were denied.
3. The parties filed *Agreed Issues* on 22 February 2019.
4. The Cause was heard on 20 March 2019 when the Respondent's Chief Operating Officer testified, and on 25 June 2019 when the Claimant testified. The witnesses also adopted their filed witness statements (the Court took the Respondent's case first because the witness was based out of the jurisdiction and had limited time in the country).
5. The Claimant filed her submissions on 24 July 2019 while the Respondent filed its submissions on 23 August 2019.
6. The Court has considered the pleadings, evidence and submissions, and will examine the Cause in terms of the *Agreed Issues*.

Grounds of termination

7. The ground given by the Respondent for the termination of the Claimant's employment was restructuring. The reason flowing therefrom naturally would be redundancy.
8. The Claimant, though not expressly pleading so, asserted that the termination of her employment was because of her pregnancy.

Unfair termination of employment Procedural fairness

9. Section 40 of the Employment Act, 2007 sets out the conditions an employer intending to terminate an employment contract for operational reasons should comply with.
10. The Respondent notified the Labour Office of the intended termination of the Claimant's employment through a notice whose date cannot be deciphered from the copies filed in Court. The Court will take it as disclosed in the witness statement that it was on 12 June 2014.
11. However, apart from the notice to the Labour Office, section 40(1)(b) of the Employment Act, 2007 demands that a formal notice of at least a month be given to the employee.
12. The Respondent issued a letter dated 12 June 2014 addressed to the Claimant and referenced *Proposed Restructuring and potential retrenchments*.
13. The letter advised the Claimant that her position of *Strategy Execution Manager* would be advertised and relocated to South Africa. The letter also indicated that consultations would be held and that a notice of termination would likely be given on 1 July 2014.
14. The letter also adverted to the selection criteria to be used and indicated that only 1 employee was likely to be affected. The employee

was the Claimant (section 40(1)(c) of the Employment Act, 2007 sets out the selection criteria where restructuring would lead to redundancies).

15. The Court finds that the Respondent was in substantial compliance with the statutory conditions on retrenchment (severance pay was also paid).

Substantive fairness

16. Just like in other termination of employments, an employer justifying termination of employment on account of operational reasons should prove the operational reasons leading to retrenchment, and that the reasons were valid and fair in terms of sections 43 and 45 of the Employment Act, 2007. Such a decision should also be in accord with justice and equity in terms of section 45(4)(b) of the Act.

17. An employer is free to run its business as it feels would meet its business and operational model, and the Court should tread carefully when such managerial prerogative is invoked.

18. It was not disputed that the position of *Strategy Execution Manager* was being relocated to South Africa.

19. It was also not disputed that around 31 May 2013, the Respondent issued an internal newsflash advising employees that positions including that of *Strategy Execution Manager* based in South Africa were open for applications. The Claimant did not apply.

20. The Claimant's contract provided that the Respondent reserved the right to transfer the Claimant to other countries, in which the Respondent had a presence.

21. On 8 July 2014, one of the Respondent's Managers while responding to an email from the Claimant advised her that she was free to apply for the position of *Strategy Execution Manager* based in South Africa but if she was not keen then other available positions could be shared with her to consider before end of July 2014.

22. Despite offering the Claimant an opportunity to apply for the position (based in South Africa), the Respondent did not attempt to explain why it did not consider transferring the Claimant to operate from South Africa, where she had previously been deployed.

23. In the case at hand, the role of *Strategy Execution Manager* was not shown as having been superfluous in the Respondent's operations, it was only being moved.

24. It is instructive that the Respondent did not even suggest that the Claimant lacked the qualifications, skills or experience for the position. In fact, the Claimant's role covered a large part of Africa.

25. Despite the Respondent having given the Claimant the option to apply for the same role but based in South Africa, the Respondent did not place before the Court any facts upon which it could be deduced that a restructuring exercise was necessary.

26. The Respondent equally did not disclose the existence of any factors or circumstances which prevented it from transferring the Claimant to operate from South Africa, noting that it did not controvert the Claimant's evidence that she was an excellent performer.

27. Further, it is the view of the Court that in the globalised business and employment arena, the mere transfer of a role to a different country without more would not suffice as a valid and fair reason to declare a redundancy.

28. The Court, therefore, finds that the Respondent failed to discharge the burden placed on it by sections 43 and 45 of the Employment Act, 2007 that there were valid or fair reason(s) to terminate the Claimant's contract on account of redundancy, or that such action was in accord with justice and equity.

Discrimination on account of pregnancy

29. The greater part of the Claimant's testimony was in respect of alleged discrimination on account of pregnancy and motherhood.

30. Article 27 of the Constitution has assured women of the right to equal treatment in different spheres of life including during pregnancy. Section 5(3) of the Employment Act, 2007 on its part outlaws direct or indirect discrimination on the grounds of pregnancy.

31. It is within this legal framework that the Court will examine the allegations of discrimination by the Claimant.

32. Broadly, the Claimant set out 3 grounds in alleging discrimination. The Court will examine each of the grounds.

Cancellation of maternity leave as discrimination

33. There was no dispute that the Claimant had pregnancy complications. On 28 October 2013, she was given 21 days sick-off and that she gave birth on 13 November 2013 before the lapse of the sick off.

34. The Claimant then applied for maternity leave from 3 December 2013.

35. The Respondent declined to approve the application through an email of 12 December 2013. On 27 January 2014, the Respondent approved the Claimant's application for maternity leave to run from 13 November 2013 until 10 February 2014.

36. The Claimant contended that this amounted to discrimination.

37. The Respondent countered that it rejected the application on the premise that maternity leave commenced on 13 November 2013 when the Claimant gave birth and that the birth automatically extinguished the sick leave.

38. The Court agrees with the Respondent that the sick leave became superfluous or was overtaken by events upon the Claimant giving birth on 13 November 2013 and that therefore maternity leave could be deemed to have commenced on that date.

39. The Court, therefore, does not accept the Claimant's argument that the rejection/cancellation of leave amounted to a discriminatory practice.

Harassment pre-natal and ante-natal

40. The Claimant also alleged that she was harassed by 2 Managers by being instructed to report to work during sick leave, and during and after maternity leave.

41. The Claimant asserted that despite the sick and maternity leave, she was constantly called on the phone and contacted through emails prompting her to report to work prematurely, despite the fact that she had a delicate child.

42. To evidence the discrimination, the Claimant stated that upon resuming from maternity leave, she found that her roles had been assigned to 2 of her junior colleagues.

43. The Claimant also took issue with her Line Manager for asking her about her future plans for pregnancy and urged that this was a ploy to determine the suitability of retaining her in employment.

44. According to the Claimant, the Respondent failed to provide her with reasonable accommodation, and that this was part of the groundwork to remove her from work on account of redundancy.

45. In resisting these particular allegations, the Respondent contended that the Claimant was accommodated both before and after giving birth by being allowed to work from home (correspondences filed) and also allowing her time off work.

46. The Claimant did not interrogate the Respondent's witness testimony (records were also produced) that she was allowed to work from home at times and that on some occasions she failed to report to work at the appointed times due to her baby's condition.

47. The Court finds that Claimant did not prove to the required standard the alleged harassment or that the harassment amounted to discrimination.

6 month maternity leave

48. The Claimant had also requested that she be granted 6 months maternity on 50% of basic salary.

49. According to the Claimant, when rejecting the request, the Respondent's Human Resources Manager informed her that the option was only available to mothers with babies with extreme or severe complications.

50. The Claimant contended that this was discriminatory because mothers with normal births had been given the option.

51. However, the Claimant did not disclose particulars of any mother with normal birth who had been allowed this option. The Court is, therefore, unable to find discrimination on this ground.

Breach of contract

Gym allowance

52. The Respondent made good the outstanding gym allowance in the sum of Kshs 24,713/- after separation, and therefore nothing turns on this head of claim.

Accrued leave

53. Annual leave is both a contractual and statutory entitlement.

54. The Claimant contended that she had 5 pending leave days by the date of separation which she computed as equivalent to Kshs 50,837/-.

55. The Claimant was paid on account of outstanding leave and in the view of the Court, this head of claim is overtaken by events.

Compensation

56. The Claimant served the Respondent for about 5 years and in consideration of the length of service and that she was paid other terminal/statutory dues, the Court is of the view that the equivalent of 4 months' gross salary as compensation would be appropriate (pay slip for August 2014 show a gross pay of Kshs 303,740/-).

Loss of earnings

57. The Claimant, in the submissions, urged the Court to award her Kshs 5,000,000/- being compensation for loss of earnings, loss of self-esteem, loss of professional pride and mental anguish.

58. The Claimant did not plead any cause of action related to loss of earnings, loss of self-esteem, loss of professional pride and mental anguish.

59. Some of these different reliefs bundled together constitute special damages which required to be proved specifically.

60. The relief(s) is declined.

Conclusion and Orders

61. The Court finds and declares that the Claimant failed to prove discrimination on account of pregnancy, but finds and holds that termination of employment was unfair and was not in accord with justice and equity, and awards her

(a) Compensation **Kshs 1,214,960/-**

62. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Omoke instructed by Morara Omoke Advocates

For Respondent Mr Omondi instructed by Coulson Harney Advocates

Court Assistant Lindsey