



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.503 OF 2014

HELLEN KEMUNTO..... CLAIMANT

VERSUS

MUMIFLORA LIMITED RESPONDENT

JUDGEMENT

The claim herein is based on the grounds that the claimant was employed by the respondent on contract dated 17th March, 2014 as a human resource manager on a 3 years renew and on 3 months' probation.

The terms of contract were that the claimant would be placed on 3 months' probation and had a right to maternity leave for 90 days with full pay in accordance with section 29(8) of the Employment Act.

The probation period ended on 17th June, 2014. Employment was then terminated on 21st August, 2014. The claimant was then earning Ksh.44, 058.00 per month.

The claimant had worked diligently for the respondent and was in charge of 550 employees located at Ngorika farm.

On 20th August, 2014 the directors and accountant carried out an appraisal and the claimant was given an undertaking that she would be issued with a confirmation letter. On 19th August, 2014 while the claimant was in the course of her employment, she was summoned by the director and asked to present her medical report and specifically on the expected date of delivery before she could be issued with a confirmation letter.

On 20th August, 2014 the claimant presented the medical report as directed. On 21st August, 2014 the claimant was summoned by the accountant and issued with a letter terminating her employment together with the medical reports she had submitted the previous day. No reasons were given and the directors locked her out of office causing the claimant great humiliation. Such resulted in wrongful, illegal and malicious termination of employment.

There was unfairness and malice when the respondent failed to give the claimant any notice with regard to termination of employment, no reasons were given, no hearing was allowed, and there was discrimination against the claimant on the basis of her maternity status.

The claim is also that her case was one of discrimination due to her maternity status as one of her colleagues Peter Mwangi who was engaged at the same time and on probation on similar terms was confirmed and issued with letter of confirmation. This was discriminative, unfair and wrongful

The claimant was then paid Ksh.86,435.00 as her dues which was less as she was entitled to 3 months' pay in lieu of notice, 21 days worked in August, 2014 and compensation for unfair and damages for discriminatory treatment.

The claimant is therefore seeking the following;

1. *3 months' notice pay ksh.132,174.00;*
2. *Compensation Ksh.528,696.00;*
3. *Damages for discrimination Ksh.2,643,480.00;*
4. *General damages for humiliation and injury to reputation ksh.200,000.00;*

5. Damages for loss of income for 2 years and 6 months ksh.1,321,740.00;

6. Certificate of service; and

7. Costs.

The claimant testified that upon employment by the respondent she was placed under probation for 3 months ending 17th June, 2014. She stayed for months without a letter of confirmation whereas the production manager, Peter Mwangi who had been employed at the same time as the claimant was issued with letter of confirmation by the respondent. The claimant learnt of the confirmation letter for Peter Mwangi when she was called by his bank to confirm his employment status as he had applied for a loan.

The claimant also testified that she went to the director seeking for her letter of confirmation and was asked to submit her pregnancy and delivery date medical letter as the director was due to travel to the United States of America (USA). She attended hospital for a scan on 19th July, 2014. The claimant took leave and presented the scan with her delivery date on 20th August, 2014 and which indicated the date of delivery was 31st November, 2014.

On 21st August, 2014 the claimant was called by the accountant and issued with letter terminating her employment without being given any reasons, notice or a hearing. Such was sudden and the claimant went into shock as she had not expected such action.

The respondent paid for notice of one (1) month, pro-rated leave and for days worked.

The claimant also testified that the respondent in defence has raised the case of Peter Gachie which happened on a Saturday when she was on her day off as she is a seventh day Adventist and this is her day of worship. The case of Mary Muhia was pending for a warning letter. The case of Douglas Mutiya was resolved by Peter Mwangi and related to events and dates which had not taken place. These matters were addressed to the claimant in an email she did not have and thus did not receive the communication. The alleged employee's unrest took place before she was employed by the respondent. The alleged performance review by Lucy Yida on 20th June, 2014 did not take place.

The claimant also testified that there was no complaint made against her and which was/were brought to her notice before termination of employment. The records submitted by the respondent in defence are an afterthought and meant to derail justice.

Defence

In response, the respondent's case is that the claimant was employed as human resource manager on probation terms and there was no confirmation. The claimant accepted her employment from 1st April, 2014. She was earning Ksh.55, 000 per month.

As a senior manager the claimant was assigned with duties of management but there were complaints from employees with regard to intimidation, interference and arbitrary warnings. As a result there was an aborted unrest by the employees resulting in a letter of warning to the claimant.

On 13th June, 2014 during appraisal by the respondent, the claimant was notified that her performance was wanting and needed to improve in several areas and her probation was extended for 3 months.

Due to the friction between the claimant and the other employees they went on a go-slow and there was no production from 20th to 23rd June, 2014 and which led to huge losses to the respondent.

The defence is also that there was no discrimination against the claimant as alleged as all female employees were allowed maternity leave, the respondent had at the time 4 employees on maternity leave and the claimant was never required to present or submit any medical records with her date of delivery as alleged.

The defence is also that the claimant went against the principle of confidentiality contrary to her employment which required her not to disclose her employment details to a third party and on 1st August, 2014 the claimant photocopied confidential documents of Peter Mwangi an employee and which document came to her knowledge by virtue of her employment. Such information was protected and confidential.

The defence is also that the claimant was employed on probation and which required 7 days' notice period to terminate and the claims made for more notice pay is not justified. There was no unfair termination of employment as the respondent followed the provisions of section 42 of the Employment Act. A certificate of service is ready for collection.

The claims due as claimed are not justified save that the claimant is entitled to;

- a) 7 days' notice pay;
- b) Wages for period worked;
- c) Pro-rated leave days

The suit was filed was unnecessary and should be dismissed with costs.

Peninah Muthoni the human resource manager at the respondent's Baraka Roses firm testified that she joined the employment of the respondent in May, 2018 and her evidence is based on the record.

Ms Muthoni testified that the claimant was employed on 17th March, 2014 and signed her letter of acceptance on 1st April, 2014 as the human resource manager of the respondent. The contract was envisaged for 3 years and probation on 3 months ending June, 2014. Probation was extended for 2 months following the claimant's work performance which was found unsatisfactory. The claimant did not improve. Employment was terminated in August, 2014.

There was an appraisal of the claimant and on the outcome, probation period was extended.

On the claim that the claimant was discriminated, this is not true as the respondent has several female employees who were on maternity leave and there is a maternity policy. In the claimant's case, she did not complete her probation period successfully.

The claimant was paid her terminal dues at ksh.86, 435.00 for days worked, leave days due and 7 days' notice.

At the close of the hearing both parties filed written submission.

On the pleadings, the evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there is a case of discrimination against the claimant;

Whether there was wrongful, unlawful and unfair termination of employment; and

Whether the remedies sought are due.

The issues above are to a large extent are juxtaposed and intertwined and shall be analysed as such.

By letter dated 17th March, 2014 the claimant was offered employment by the respondent as the human resource manager of *Baraka Roses/Mumiflora Ltd* to be based at Ngorika farm. The claimant accepted the offer of employment on 1st April, 2014. Employment however is confirmed to have commenced on 17th April, 2014.

Under the clause on probation, the claimant was to serve for 3 months and upon performance evaluation and one week's notice on either party, the employment be confirmed for 3 years term.

Section 42 of the Employment Act, 2007 gives the employer the right to place an employee on probation and before confirmation of employment for a period not exceeding 12 months. In this case the claimant was on 3 months' probation and based on the letter of employment dated 17th March, 2014 such time ended on 16th June, 2014.

The defence is that the claimant was evaluated in her performance and following various complaints on her work, the probation period was extended for 3 months. Ms Muthoni in her evidence testified that the probation period was extended for 2 months.

The respondent also produced letter dated 13th June, 2014 to the effect that the claimant's probation period was extended for 3 months. This letter is signed by Lucy Yinda the managing director.

Section 42 (2) of the Employment Act, 2007 requires that probation period can only be extended with the agreement of the employee.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

The rationale is that the employee must agree to the terms and condition leading to the extension and given approval as based on the reasons for the extension of the probation period, the employee is subject to evaluation and confirmation of full employment if found fit or subject to termination of employment if found unfit to continue in the service of the employer. See **Peris Nyambura Kimani versus Dalbit Group Limited [2016] eKLR**.

In this case, probation period extend the probation period ended on 16th June, 2014 and the letter purporting to is not with agreement of the claimant. The claimant testified that she was not issued with such letter. Indeed without the letter having the approval and consent of the claimant, it is contrary to the mandatory provisions of section 42 of the Employment Act, 2007 as held in the case of **Yvonne Achitsa Odedere versus Maseno University [2017] eKLR**.

Without the compliance with the law, as f 17th June, 2014 the claimant's employment with the respondent became confirmed. Termination of employment for good cause could only be by virtue of section 35 with notice or payment in lieu therefore under the terms of the letter of employment.

In this regard, the letter dated 20th August, 2014 terminating employment is issued by the respondent under the mistaken belief that the claimant was still under probation. Employment was terminated on the grounds that;

... it seems that you may not be adequately prepared for the responsibility.

The demands in terms of discipline and welfare of workers and style of communication require as much more mature and sensitive approach. ...

The events leading to this letter as submitted by the respondent is that there were several complaints made against the claimant by the employees.

One related to a letter dated 21st June, 2014 on unfulfilled orders following what the author said to have been directions by the claimant to leave the work station before the orders could be filled;

The other related to letter dated 21st June, 2014 with regard to alleged intimidation by the claimant of Douglas Mutiya;

Another undated letter with regard to an appeal following a warning issued by the claimant; and Another by email dated 25th March, 2014 relating to alleged unrest by the employee due to alleged poor language and communication by the claimant.

There is no evidence that such matters set out above were brought to the attention of the claimant before the employment was terminated. As noted above, the termination of employment was premised on the wrong foundation and belief that the claimant was still on probation, which was not the case.

As such, the respondent failed to meet the legal threshold under section 41 of the Employment Act, 2007 read together with section 35 and 43. There was no hearing, there was no notice, and the reasons given for termination of employment were on the basis that employment could be terminated under probationary terms.

As a result, the court finds there was unfair termination of employment contrary to section 45 of the Employment Act, 2007. The claimant is entitled to damages thereof.

The claimant had worked for the respondent for 5 months only. At the time she was earning Ksh.55, 000.00. Terminal dues were paid under the provisions of section 42 of the Act instead of section 35 and 49 of the Employment Act, 2007. The respondent is however keen to comply with section 45(5) where there was effort to pay terminal dues and these factors put into account, the claimant is entitled to notice pay of one month at Ksh.55,000.00 and not 7 days paid for and compensation is also found as appropriate for one (1) month at ksh.55,000.00.

In the payment voucher dated 26th August, 2014 the claimant as paid the following dues;

Wages for days worked Ksh.44, 000.00;

Notice pay ksh.55, 000.00;

Prorate annual leave Ksh.20, 166.67

On the claim that there was discrimination against the claimant, the evidence was that the claimant was directed to produce her medical report and delivery date by the managing director Ms Yinda which she did and as a result her employment was terminated upon submission of the medial reporting indicating date of delivery was 31st November, 2014.

The claimant also asserted that she was discriminated against as Peter Mwangi was issued with letter of confirmation yet they were employed on the same date. That Peter Mwangi was treated differently from her without justification.

The defence is that there was no discrimination against the claimant as there was a maternity policy and 4 other employees were on maternity leave for the period of January to April, 2014. There was no requirement for the claimant to produce the medical records. The defence is also that Peter Mwangi was employed as Production manager and in a different position from that of the claimant and he was appraised and found warranting issuance of a confirmation letter which was not the case for the claimant.

Allegations of discrimination against an employee are serious matters as they go contrary to the provisions of section 5 of the Employment Act. section 46 of the Act prohibits dismissal from employment on the grounds of pregnancy. Further, it is contrary to the constitution at article 27 to discriminate against any employee for any grounds and particularly due to pregnancy. Where an employee is discriminated against on any grounds, such would amount to unfair labour practice as held in the case of **Yvonne Achitsa Odedere versus Maseno University [2017] eKLR**, cited above and where it was held that;

Discrimination would therefore be categorised as an unfair labour practice. Unfair labour practice is however such a fluid term that would not in itself stand alone as a claim. An employee must specify the act that constitutes unfair labour practice to be able to justify it in a claim. It would thus be unwise for a court to make a specific finding of unfair labour practice unless it is in relation to a specific act that constitutes unfair labour practice. In the present case the failure to give the Claimant a hearing would justly to be classified as unfair labour practice; so would the failure to give her notice or to extend her probation period and practically any other act or omission by an employer that would lead to a finding of unfair termination.

In this case, the evidence is that the claimant was directed by the managing director to produce a medical report. There is no evidence of such instructions in writing and when the claimant was examined on her evidence in this regard, she did not have a coherent response. On the one

hand she testified that such directions were verbally made by Ms Yinda in July, 2014 and on the other hand that she attended and carried out two scans one in May and the other in July, 2014. That she attended clinic for the scan on 8th July, 2014 and issued with a receipt from *Mediscan Services*.

The claimant filed the medical scan dated 8th August, 2014 *the obstetric Ultrasound report* and various scans leading to such report done on 9th August, 2014. Logically, the tendered report could only follow the scans taken and not before.

Other scans are dated 10th May, 2014. There are various receipts to support the attendances for scans and report but none relates to the subject dates.

On the evidence that Ms Yinda verbally directed the claimant to undergo the medical test for her date of delivery on 19th August, 2014 the scans having been done on 10th August, 2014 and the subject report done on 8th August, 2014 such removes the respondent from the period under which the allegations of discrimination relates to.

Equally, the claim that there was discrimination between the claimant and peter Mwangi who was issued with letter confirming employment, indeed these two officers were employed for different positions. As noted above, the respondent had purportedly received complaints against the claimant over alleged poor work performance and thus her probation period extended and then terminated on the same probationary terms. As analysed above, such assessment of the claimant was in error and has been addressed by compensation.

The court finds no matter for discrimination against the claimant on the grounds of her pregnancy or the due delivery date or for non-issuance of a letter confirming her employment. The claimant submitted and relied on the case of **N M L versus Peter Patrausch [2015] eKLR** but such suit related to facts which are foundational different and distinguishable from her case. Similarly the case of **V M K versus CUEA [2013] eKLR** was premised on facts different and separate as herein.

The claimant has since been paid for due leave days. There was pay for days worked and notice pay equivalent to one (1) months' pay.

Accordingly, the claims made are hereby found without merit save for an award of compensation at ksh.55, 000.00. As the claim partially succeeds, the claimant shall be paid 25% of her costs.

Delivered at Nakuru this 7th day of November, 2019.

M. MBARU

In the presence of: