



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT NAIROBI

CAUSE NO. 1015 OF 2017

JOY AMBOGO BULIMWA.....CLAIMANT

VERSUS

CONTINEO TECHNOLOGIES LIMITED.....1ST RESPONDENT

REFUGESS UNITED (REFUNITE) KENYA.....2ND RESPONDENT

JUDGMENT

1. The claimant brought this suit on 31.5.2017 seeking the following reliefs

- (a) Determination that the claimant was unfairly, wrongfully and unlawfully terminated.
- (b) Determination that the claimant was unfairly, wrongfully and unlawfully terminated for no reason at all.
- (c) An order for the payment to the claimant for the actual pecuniary loss suffered as the result of the unlawful and wrongful summary termination.
- d) General damages and Exemplary damages
- (e) Constitutional damages for constitutional rights violation
- (f) An order for the payment of interest to the claimant by the respondent on the judgment amount
- (g) An order for the payment of legal costs.
- (h) An order for the issuance of certificate of service
- (i) An order for the payment of other costs and any other relief this Honourable court may deem fair and fit to grant.

2. The facts of the case according to the claimant are that she was employed by the 1st respondent as a project officer – Kakuma earning Kshs. 120000 per month until she was unfairly and unlawfully terminated vide the letter dated 5.4.2017. In her view the termination was not founded on any justifiable reason and no prior hearing was accorded to her. She further averred that the reason for her termination was her pregnancy and it amounted to discrimination contrary to both the constitution and statutory law.

3. The 1st respondent denied the alleged unfair and unlawful termination and averred that the termination was done in accordance with the claimant's employment contract. She averred that the claimant was issued with a termination notice on 5.4.2017 in accordance with clauses 15.1 and 15.3 of the employment contract citing the reason for the termination and offering to pay her one month salary in lieu of notice, reimbursement of her air fare and reasonable moving expenses. She therefore prayed for the suit to be dismissed with costs for lack of merit.

4. The main issue for determination herein is whether the termination of the claimant's employment contract by the respondents was unfair, unlawful and unconstitutional. To answer the question, the claimant tendered evidence and thereafter filed written submissions but the respondents did not.

CLAIMANTS CASE.

5. The claimant testified as CW1. In brief she stated that she was employed by the 1st respondent on 1.1.2015 but she was given duties by the 2nd respondent which was the owner of the 1s respondent.
6. She further testified that on 9.12.2016, she proceeded for a maternity leave till 4.4.2017 when she was to resume work. However on 24.3.2017, she received a call from the Chief Operations Officer who informed her that her contract had been terminated because the employer could not afford her salary anymore. The information shocked her because she had already booked her flight back to Kakuma and it came at the tail-end of her maternity leave. She nevertheless travelled to Kakuma to collect her belongings and surrender the house.
7. She went on to state that, on 5.4.2017 she received a termination letter by email stating that the reasons for termination as irreconcilable differences. The said reason was not explained to her and she never understood it. She contended that she was not given any warning nor was she accorded any disciplinary hearing before the termination.
8. She further testified that it was not the first time the respondent had dismissed her staff after going on maternity leave. She cited Susan Wanjiku as one of the employees dismissed while on maternity leave in April 2016. CW1 contended that the only reason for her termination was pregnancy and termed the termination discriminatory.
9. She prayed for the reliefs set out and tabulated in her statutory of claim including compensation for the unfair termination and certificate of service. She contended that since the termination of her services by the respondents, she has never secured any other employment.

SUBMISSIONS

10. The claimant submitted that section 41,43 and 45 of the Employment Act requires an employer to prove a valid reason or reasons for termination, and that the termination process was carried out fairly. She further submitted the reason cited for termination in the letter dated 5.4.2017 being "irreconcilable differences" was not proved to be valid and fair reason for terminating the claimant's contract of service. She contended that the said reason is not provided at law.
11. She maintained that her termination was on ground of pregnancy and/or reason connected with pregnancy which in her view was contrary to section 43 and 46 of the Employment Act and therefore the termination was unfair within the meaning of section 45 of the Employment Act.
12. She further submitted that the termination on account of pregnancy amounted to violation of her constitutional freedom from discrimination. She therefore prayed for damages as tabulated in her statement of claim plus costs.

ISSUES FOR DETERMINATION

13. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent from 1.1.2015 until 5.4.2017 when her contract of service was terminated. The issues for determination are :
- (a) Whether the termination was unfair and unlawful.
 - (b) Whether her fundamental rights and freedoms under the constitution were violated.
 - (c) Whether she is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

UNFAIR TERMINATION

- 14 Under section 45 (2) of the Employment Act, termination of an employee's employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements, and that fair procedure was followed. Fair procedure involves but it is not limited to according the employee a hearing before discharging him/her on account of misconduct, poor performance or physical incapacity.
15. In this case the employer cited the reasons for termination as irreconcilable differences. The said reason was not explained to the claimant and I am left to interpret it to mean incompatibility under Section 45 (2) (b) of the Employment Act. The respondents did not tender any evidence to prove the validity of the said reasons. I therefore return that the respondents have failed to prove on a balance of probability that there existed a valid and fair reason for terminating the claimant's contract of service.
16. In addition to the foregoing, I find that the respondent have failed to prove that a fair procedure was followed. There is no denial that the claimant was not accorded a prior notice. It is a fact that the termination was communicated via emailed letter before the author afforded any hearing to the claimant.
17. It is now settled that termination of an employee's contract of service by his/his employer is unfair if the same is not grounded on a valid and fair reason and if fair, procedure was not followed. It is also settled that unless the employer proved the existence of a valid and fair reason (s) and that fair procedure was followed, the court will declare the termination unfair and proceed to grant appropriate reliefs under

section 49 of the Employment Act. In this case I return that the termination was unfair and unlawful for want of a valid and fair reason and because a fair procedure was not followed.

RELIEFS

In view of the foregoing, I award the claimant compensation for unfair termination under section 49(1) of the Employment Act. The claimant worked only for about two and half years but she had the expectation of continuing to work for an indefinite period. She did not contribute the termination through misconduct and she had not been served with any warning letter during her service. She has also not been able to secure another job since the said unfair termination. The time when the termination was difficult for the young mother who had just returned from her maternity leave and was now to relocate from Kakuma to settle in another place hundreds of miles away. Considering the foregoing circumstances I award the claimant six months' salary as compensation for the unfair termination equalling to Kshs. 720000.

19. The claim for service pay is dismissed because the claimant was a member and beneficiary of the National Social Security Fund (NSSF). Under Section 35 (6) of the Employment Act, a beneficiary of NSSF is disqualified from claiming service pay.

20. The claim for annual leave earned between January and April 2017 is allowed on a pro rate basis. Her annual leave under the contract of employment was 22 days meaning that between 3rd January and 5th April 2017, she earned 5.5. leave days. Hence Kshs. 120000 x 5.5/26= 25385.

21. The claim for damages for discrimination based on pregnancy is dismissed for lack of merit. The claimant was allowed to work until she proceeded on her maternity leave. She did not contend that she was terminated before going for the maternity leave nor did she allege that she was denied salary during the maternity leave. Consequently I find the alleged discrimination a little bit over stretched and based on nothing more than imagination.

23. The claim for Kshs. 115,000 for air ticket and relocation from Kakuma is not backed by evidence. However it is common knowledge that the claimant relocated and the employer offered to reimburse reasonable costs. I award Kshs. 70,000 for that expense.

22. The claim for certificate of service is granted as prayed because it is a right under section 51 of the Employment Act.

CONCLUSION AND DISPOSITION

23. I have found that the termination of the claimant services by the respondent was unfair and unlawful. I have further found that she is entitled to compensation for the unfair termination, accrued leave and reimbursement of reasonable cost of relocating from Kakuma. Consequently, I enter judgment for her against the respondents as follows:

Compensation Ksh. 720000

Leave Ksh. 25385

Cost of relocation Ksh. 70000

Ksh. 813,385

The said sum is subject to stationery deduction. The claimant will have certificate of service plus cost and interest at court rates from the date hereof.

Dated, signed and delivered at Nairobi in open court this 20th day of December, 2019.

ONESMUS MAKAU

JUDGE