



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 86 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF THE ACTUAL BREACH OF THE SUBJECT'S CONSTITUTIONAL
RIGHTS ENSHRINED UNDER ARTICLES 19, 27, 28, 31, 41 AND 47**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF EMPLOYMENT ACT, 2007 SECTION 5(2) AND (3), 17, 29, 31, 41, 43, 45 AND 49

BETWEEN

RACHEAL WANJIKU MWANGI.....PETITIONER

VERSUS

BIDWOOD SUITES HOTEL LIMITED.....RESPONDENT

JUDGMENT

The Petitioner through her Petition filed in Court on 3rd September, 2018 avers that she was employed by the Respondent herein as a Laundry Attendant, a position she held from 24th November, 2014 until 26th January, 2017 when her services were unlawfully, unreasonably and unjustifiably terminated by the Respondent.

The Petitioner avers that on 16th January, 2017 she did notify her immediate supervisor, applied for and filled leave forms seeking maternity leave for the period commencing March to May 2017 which application was withheld by the Respondent and no response issued to the same.

The Petitioner further avers that she continued performing her duties as usual until 26th January, 2017 when she was summoned to the Human Resource Office and was issued with a summary dismissal letter, which letter she contends raised a myriad of allegations which she states are not true.

The Petitioner further contends that following her unfair and unlawful summary dismissal on 26th January, 2017, the Respondent continued to withhold her salary for the 26 days worked in January, 2017 only resorting to call her on 2nd February, 2017 asking her to collect her certificate of service together with a cheque of Kshs.2,740 being her final and/or terminal dues.

The Petitioner contends that the Respondent's actions as highlighted above were in clear violation of the provisions of Article 27, 28, 31, 41 and 47 of the Constitution of Kenya, 2010.

Aggrieved by the decision to unfairly and unlawfully terminate her services the Petitioner filed the instant Petition seeking the following reliefs:

- a) A declaration that the Respondent violated the Petitioner's rights under Article 19, 27, 28, 31, 41 and 47 of the Constitution.
- b) A declaration that the Respondent's deliberate refusal to approve maternity leave application, subsequent withholding of salary belonging to the Petitioner and the ultimate decision to dismiss her were all wrongful, illegal and unconstitutional.
- c) The Petitioner be paid her terminal benefits and compensation as set out in Paragraph 31(d) hereinabove totalling to Kshs.913,349.85.
- d) An Order of compensation for general damages as provided for under Article 23(3) of the Constitution.
- e) The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- f) That the costs of this Petition be granted to the Petitioner.

In response to the Petition filed the Respondent through the firm of Ashitiva Advocates LLP filed its Replying Affidavit deponed by **AALLY VALLI**, the General Manager, on 22nd October, 2018 and filed in Court on even date in which he confirms having employed the Petitioner as a Public Area, Laundry Attendant from November, 2014 to January, 2017.

The Respondent denies the assertion made by the petitioner that her dismissal was based solely on account of her pregnancy, which it contends was never brought to its attention. The Respondent further denied having received any application for maternity leave from the Petitioner herein and that it had no reasons to retain the said forms as alleged by the Petitioner.

The Respondent contends that the Petitioner's summary dismissal was due to the fact that she breached terms of her employment contract. That she was further given an opportunity to make her presentation prior to her termination as required under the Employment Act but failed to do so.

The Respondent contends that the Petitioner's termination was therefore justified and lawful. It is further contended that the petitioner was paid all her dues at the time of her separation and therefore has no claim against the Respondent. That she signed the acknowledgment letter dated 2nd February 2017 confirming receipt of the payment.

The Respondent states that the instant Petition is incurably defective, incompetent, misconceived, has no merit whatsoever, is an abuse to the Court process as it fails to disclose any reasonable grounds for warranting the grant of the reliefs sought therein. It is on this basis that the Respondent urged the Court to dismiss the Petition with costs.

Parties agreed to dispose of the Petition by way of written submissions.

Submissions by the Parties

The petitioner submitted that the Respondent had no valid reason to terminate her employment having established that at the time of separation she was seven (7) months pregnant and that her termination was due to her pregnancy.

The Petitioner further submitted that the Respondent failed to discharge the burden of proof of the reason for the Petitioner's termination as provided under Section 43(1) of the Employment Act, 2007.

The Petitioner contends that the respondent failed to follow due process as provided under Section 41 of the Employment Act, 2007 in that she was not called for a disciplinary hearing prior to her termination. The Petitioner further contended that this failure by the Respondent was in complete violation of the rules of natural justice. The Petitioner relied on the case of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR**.

The Petitioner submitted that the Respondent suddenly found wrongs in her work following her decision to notify it of her looming maternity request on 16th January, 2017 and 19th January 2017, which culminated in her termination on 26th January 2019.

The Petitioner further submitted that the above actions by the Respondent were tantamount to discrimination on account of her pregnancy which is contrary to the provisions of Section 5(2) and (3), 29 (1) and (2) of the Employment Act, 2007 and Article 27 of the Constitution of Kenya. To fortify this argument the Petitioner relied on the cases of **GMV Vs Bank of Africa Kenya Limited (2013) eKLR** and **Janine Buss Vs Gems Cambridge International School Limited (2016) eKLR**.

The Petitioner further submitted that she has proved her case that her right to privacy as provided under Article 31 has been violated which includes her right not to have information relating to her private affairs unnecessarily required.

The Petitioner further contends that her right to fair labour practices as set out under Article 41 of the Constitution has been violated as well as her rights as envisaged under Article 47(2) on fair administrative actions.

The Petitioner contends that her termination on account of her pregnancy was in complete violation of Section 5(3)(a) of the Employment Act and ILO Convention No. 183 of 2000 on Employment Protection & Non-discrimination. Further that the deliberate actions of the Respondent of not approving her intended maternity leave violates the provisions of Section 29 (1) and (2) of the Employment Act, 2007

The Petitioner contended that she is therefore entitled to the reliefs sought in her Petition and urged the Court to allow the same as prayed.

The Petitioner further contended that she is entitled to compensation for damages as provided under Article 23(3) of the Constitution. The Petitioner urged the Court to award her a global sum of Kshs.3,000,000. the Petitioner cited and relied on the case of **Tracy Wangechi Mugambi Vs Windsor Golf Hotel and Country Club (2019) eKLR** and **Daniel Musinga T/A Musinga & Co. Advocates Vs Nation Newspapers Limited (2006) eKLR**.

In conclusion the Petitioner urged the Court to allow her Petition as prayed.

Respondent's Submissions

The Respondent submitted that there are no constitutional issues raised from the Petitioner's termination as the Petitioner failed to relate how the provisions of Articles 19, 27, 28, 31, 41 and 47 of the Constitution affect her Petition. Further, that the Petitioner failed to plead with particularity what she is complaining of, the provision that is said to have been violated and the particular manner in which the particular right is violated. To buttress this argument the Respondent cited and relied on the case of **Anarita Karimi Njeru Vs Republic (No. 1) (1979) 1 KLR 154**.

The Respondent further submitted that the termination of the Petitioner's employment is a contractual agreement governed by her contract and the terms and conditions of employment. It is further submitted that the Petitioner herein could have filed an ordinary claim. The Respondent relied on the case of **David Ramogi and 4 Others Vs The Cabinet Secretary, Ministry of Energy and Petroleum and 7 Others (2017) eKLR**.

The Respondent further submitted that the Petitioner's termination was fair both procedurally and substantively. It is further averred that the Petitioner was not terminated on account of her pregnancy but rather her employment was terminated on account of her insubordination and gross misconduct as evidenced by the notice to show cause letter dated 19th January, 2014 which she failed to respond to. To fortify this argument the Respondent cited the case of **Vincent Mboga Machogu Vs Vision Institute of Professionals (2015) eKLR** where it was stated:

“...absenteeism from work and lateness without permission were valid and fair reasons for terminating the Claimant's services...”

The Respondent further submitted that the Petitioner has not brought sufficient evidence to this Court to support the assertion that she was a victim of discrimination on the basis of her pregnancy. To buttress this argument the Respondent relied on the Court findings in the case of **Alnashir Popat and 8 Others Vs Capital Markets Authority (2016) eKLR**.

It is the Respondent's contention that the assertion of discrimination on account of pregnancy relied upon by the Petitioner is therefore untrue and aimed at misleading the Court. The Respondent further relied on the case of **Lillian Khayere Vs New Day Academy (2017) eKLR**.

The Respondent submitted that the Petitioner is not entitled to the reliefs sought in her Petition, due process having been followed in her termination as provided under Sections 41, 44 and 45 of the Employment Act and her employment contract. the Respondent relied on the cases of **Vincent Abuya Obunga Vs Mast Rental Services Limited (2019) eKLR**, **Jasper Mwenda Ikiara Vs Housing Finance Limited (2015) eKLR** and **National Bank of Kenya Limited Vs Pipe Plastic Samkolit (K) Limited & Another (2001) eKLR**.

On the issue of costs the Respondent submitted that the petitioner is not entitled to the same as they follow the event unless the Court or Judge shall for good reason otherwise order. It relied on the findings in the case of **Morgan Air Cargo Limited Vs Evrest Enterprises Limited (2014) eKLR**.

In conclusion the Respondent submitted that it had proved that it had reasons to terminate the Petitioner and that the same was procedurally done in a fair, valid and lawful manner. It is therefore its submission that the instant Petition ought to be dismissed with costs.

Analysis and Determination

Having considered the petition, the Affidavits on record, the submissions filed by the parties and the authorities cited, the following are the issues for determination:-

1. Whether the Petitioner has met the threshold for filing the instant Petition
2. Whether the petitioner is a victim of discrimination on the basis of her pregnancy
3. Whether the Petitioner is entitled to the reliefs sought.

In determining whether a Petitioner has met the threshold set in seeking the reliefs sought, this Court is guided by the Constitution in addition to principles set out by courts in respect of violation of constitutional rights. In the celebrated case of **Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272 eKLR** it was held:

“...We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

This principle was restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR* the court stated thus:-

“The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective. Principle under section 1A and 1B of the civil procedure Act (Cap 21) and Section 3A and 3B of the appellate Jurisdiction Act Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extract of this principle.”

Having perused the Petition together with the supporting affidavit by the Petitioner I find that the Petitioner has not disclosed with precision how her rights were violated by the Respondent herein. Under the various provisions of the Constitution that she has cited. She failed to specify which action of the respondent violated her rights under each of the provisions. All she did is mention the action of the respondent being the termination of her employment, and then list the various provisions of the constitution. I further agree with the respondent's submissions that the averments by petitioner are matter of contract that could adequately be addressed in a normal claim. I am therefore of the view that the Petition before this Court falls short of the threshold required for a constitutional Petition as provided under the case of *Anarita Karimi Njeru (Supra)*.

Whether the petitioner is a victim of discrimination on the basis of her pregnancy

The Petitioner contends that she was a victim of discrimination on the basis of her pregnancy and that the reasons cited by the Respondent for her termination were not genuine. She further contended that the Respondent had no valid reason for her dismissal and that the Respondent's conduct was tantamount to discrimination which is in complete violation to the provisions of Section 5(2) and (3) and 29(1) and (2) of the Employment Act. To buttress this argument the Petitioner cited and relied on the case of *Janine Buss Vs Gems Cambridge International School Limited (2016) eKLR*.

The Petitioner further submitted that the Respondent failed to follow the mandatory provisions on termination as highlighted under the provisions of Section 41 of the Employment Act, 2007.

The Respondent on the other hand painted a totally different picture of the Petitioner herein. It was contended by the Respondent that it did have reasons to terminate the employment of the Petitioner and that in doing so it did adhere to the mandatory provisions as set out in the Employment Act, 2007.

The Respondent contended that the Petitioner was a habitual latecomer and attached a copy of the logs indicating the time she used to clock in. It is clear from the extract there is no time when she (the Petitioner) reported to work at the required time.

The Respondent further contended that the Petitioner was disrespectful to her immediate supervisor as she failed to respond to the notice to show cause dated 19th January, 2017.

The Respondent submitted that it had just reason therefore to terminate the Claimant's employment contract as highlighted in her summary dismissal letter dated 26th January, 2017.

On the issue of maternity leave forms the Respondent denied knowledge of the same and stated that it would not withhold the same.

What is discrimination?

Section 5(2) and (3) of the Employment Act, 2007 provides as follows:

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(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, marital status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

Looking at the evidence adduced in this matter it is true that the Petitioner reported to work late on several occasions. It is also true that she did not avail any explanation to the Respondent on her lateness on all the occasions which prompted the Respondent to terminate her employment summarily following the issuance of the notice to show cause which she failed to the respond to.

It is my finding that the Respondent was justified to terminate the Petitioner's employment and that in doing so the respondent did not

discriminate upon her on the basis of her pregnancy.

Further on the issue of the maternity leave forms the Petitioner failed to show that she did submit the same to the Respondent's Human Resource Officer for approval. Further the petitioner was not due for maternity until March 2017. I have further noted that the letter applying for maternity leave at page 10 of her documents is dated 16th June 2017, long after she left employment. The same could not thus have been submitted to the employer with the application form for maternity leave.

In the case of *Vincent Mboga Machogu Vs Vision Institute of Professionals Limited (2015) eKLR* the court held that –

“...absenteeism from work and lateness without permission were valid and fair reasons for terminating the Claimant's service.”

The Petitioner failed to explain the reasons for her habitual lateness. She cannot seek solace in her pregnancy as the same was not an excuse for lateness or insubordination.

I therefore find that the Petitioner was not a victim of discrimination on account of pregnancy as contended.

Was procedure followed in the Petitioner's termination

The letter of summary dismissal states that the disciplinary hearing was held on 19th January 2017. According to bullet 2 of the letter, it is the same date that she is accused to have been insubordinate to her immediate supervisor and the date she was asked to show cause within 2 days. It would therefore appear as if the show cause letter was issued after the disciplinary hearing, which should be the reverse. There is no evidence that the petitioner was given a hearing after her failure to respond to the show cause. There is further no evidence that the respondent complied with Section 41 of the Employment Act.

To that end, the termination of the petitioner's employment was procedurally unfair.

Whether the Petitioner is entitled to the reliefs sought

The Petitioner at the time of separation received a sum of Kshs.2,740 which amount was duly acknowledged as terminal dues owing to the Petitioner then.

Having found the termination procedurally unfair for want of a hearing as provided under Section 41 of the Employment Act, the petitioner is entitled to pay in lieu of notice which I award her in the sum of Kshs.21,269. I further award her compensation equivalent to 2 months' salary in the sum of Kshs.42,538. **Total award is Kshs.63,807.00**

All other prayers are dismissed.

The petitioner will have costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE