



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JR NO. 13 OF 2015

(FORMALLY CAUSE NO. 344 OF 2015)

(Before Hon. Justice Mathews N. Nduma)

B O.....CLAIMANT

VERSUS

R S S.....RESPONDENT

J U D G M E N T

1. The suit commenced by originating summons under sections 70, 74, 82 and 84 of the constitution of Kenya 1969. The suit also finds basis under the constitution of Kenya (Protection of fundamental Rights and Freedoms of the Individual Practice and Procedure Rules, 2001).
2. Due to its nature and content, the matter shall herein after be referred to as B O –vs- R S S.
3. The suit was filed at the High Court on 13th April, 2005 and has a protracted history. It was eventually transferred to this court by Justice Jarus Ngaah on 26th February, 2015, about ten (10) years later.
4. The Claimant is represented by Rachier & Amollo Advocates.
5. The Respondent is represented by E. M. Wachira & Co. Advocates. The Respondent filed Replying Affidavit to the originating sum mons dated 9th May, 2005 on 12th May, 2005.
6. The Claimant filed written submissions on 12th February, 2009 and the Respondent filed written submissions on 8th April, 2009.
7. The pleadings closed at that point. The court was misguided on the status of the matter when it was mentioned for directions and had it registered as a JR when it is indeed a constitutional application for enforcement of fundamental rights. The court proceeds to treat the matter as such and shall not consider documentations filed after the close of pleadings.
8. In any event, the witness statements filed and adopted by the Claimant only echo the pleadings and written submissions earlier filed and introduces nothing new. The Respondent had similarly filed a comprehensive replying affidavit and written submissions.

Plaintiff's Case

9. The Plaintiff was employed by the Respondent in September 2000. During the said term of employment, the plaintiff had a love affair with the Respondent. Before the commencement of the love affair with the Respondent the Plaintiff's HIV status was negative, but soon thereafter she tested HIV positive.
10. The Plaintiff believes that the Respondent infected her with HIV virus on the basis that the Respondent was his only sexual partner at the time.
11. The Plaintiff worked diligently and continuously, until her employment was terminated by the Respondent upon disclosing her status to him. The Respondent assaulted her on several occasions leading to the Plaintiff filing Criminal charges which were later withdrawn.

12. On 10th November, 2004 the Respondent trespassed in the property of the Plaintiff by breaking into her house and stole most of her documents relevant to this suit. Pursuant to this action Criminal charges were filed against the Respondent and the matter was still in progress in Kibera Law Courts at the time of filing suit.

13. On 12th November, 2004 at 8.30 am the Defendant terminated the employment of the Plaintiff verbally, without notice or legitimate cause.

14. It is the Claimants case that, under section 70 of the erstwhile constitution, every person is entitled to the human rights and fundamental freedoms among others right to life.

15. That the Respondent subjected her to torture and inhuman and degrading treatment contrary to section 74 of the constitution. That she was discriminated upon contrary to section 82 of the constitution upon disclosure of her HIV status to the Respondent and her employment was terminated as a result.

16. The Plaintiff relies on the case of *MX vs ZY*, Air 1997 BOM 406, in which the petitioner, a loader in Public Sector Company was removed from the roster of casual labourer and his usual labour contract cancelled upon testifying HIV positive. The Indian High Court held that, an HIV positive person could not be denied recruitment to a job so long as he/she can perform the duties and as long as he/she does not pose a significant risk to others.

17. The case of *X vs State Bank of India* (2002) in which Bombay High Court relying on the decision in *MX vs ZY*, Air 1997, held that, a person living with HIV cannot be denied opportunity of employment merely on the grounds of HIV status.

Response

18. The Respondent in his replying affidavit of denies in total, the allegation by B.O in the originating summons and alleges that the allegations constitute perjury are scandalous, vexatious and an abuse of the court process.

19. The defendant denied having employed the plaintiff at all in S Holdings.

20. The Respondent states that he was away from Kenya between November 1992 and February 1999 and upon his return he found the Plaintiff under the employ of S Holdings Limited, a company whose shareholdings has since incorporation been held by the defendant's mother, his brother, Sister and sister in law. Consequently, the Respondent had no capacity to employ the plaintiff in the said company and the company is a different Legal entity from the Respondent.

21. That the Plaintiff worked for S Holdings Limited until November 2000 when she was summarily dismissed from employment for gross insubordination and in particular for being uncourteous to the Managing Director of the company Mrs. Satwinder Kaur Syan.

22. That upon her dismissal the defendant employed the Plaintiff on humanitarian grounds in a company known as Specialized Air Conditioning Limited, where he is the managing Director. The Plaintiff served this company as a receptionist from December 2000 until November 2001 when the Respondent summarily dismissed her from employment for gross insubordination and in particular for picking quarrels with the Respondent and customers resulting in an altercation in the office a result of which the plaintiff made a complaint to the police to the effect that the defendant had assaulted her. The Respondent was arrested, in cacerated and charged before Makadara Law Courts but soon thereafter the case was stayed, pending conciliation.

23. That the Plaintiff, took advantage of the ignorance of the newly arrived Respondent to black mail and extort money from him, failing which he would be rearrested and the case re-suscitated. The Plaintiff paid various allowances to the plaintiff, during this period under duress.

24. That on or about September 2004, the plaintiff yet again served the specialized air conditioning limited as a receptionist but she absconded from work on 12th November, 2004 when the defendant uncovered a racket she was involved in and diverted company's customers to her residence in Nairobi West Estate where customer cars would be fixed. She also stole a cell phone and set of keys from the company premises and the Respondent summarily dismissed her from employment.

25. The Plaintiff was subsequently charged before Makadara Law Courts in Criminal Case No. 1850 of 2005 with the offence of stealing *inter alia*. The case was still pending at the time of filing suit.

26. That the Plaintiff in a revenge move, made false charges of trespass at Langatta Police Station and the defendant was charged before Kibera Law Courts in Criminal Case No. 9676 of 2004 for criminal trespass but the charges were hastily withdrawn by the prosecution.

27. That the Plaintiff, continues in her schemes to extort money from the defendant but the defendant has declined to yield, hence the continued schemes to irritate, annoy and destabilize the Respondent's business.

28. The Respondent deposes that he had not known nor had any reason to know the HIV status of the plaintiff being her employer and the allegation that he had sexual contact, either protected or otherwise with the plaintiff is wholly untrue, is scandalous, vexatious and meant to embarrass the Respondent professionally and cause lifts in the Respondent's family.

29. The defendant deposes that he is HIV negative and has annexed to the replying affidavit, a certificate of the defendant and his wife marked "RSS3" dated 30th November, 2004, indicating that the Respondent and his wife were tested and their HIV status was negative.

30. That the Plaintiff sent telephone messages to the Respondent's wife to the effect that the Respondent was HIV positive, causing a lot of tension and rift in the family hence, the defendant was compelled to undergo the aforesaid HIV test with his wife. This matter was reported to the police and the Plaintiff was charged with creating a disturbance as aforesaid before Makadara law Courts.

31. The Respondent denies knowledge of the alleged other woman he had a love relationship with and denies the allegations by the Plaintiff to be untrue. The respondent denies having infected the claimant with HIV and or terminated her employment based on her HIV status.

32. That the allegations by the Plaintiff have not been scientifically proved, are baseless and only aimed to coerce, blackmail and injure the reputation of the defendant.

33. The Respondent also denied having assaulted the plaintiff as alleged or at all and puts her to stick proof thereof.

34. That the Plaintiff was dismissed from the employment of specialized Air Conditioning Limited by a letter dated 22nd November, 2004 for absenteeism from work, fraudulent diversion of company work, using abusive language at the office against the Director, and officers of the company, and for stealing company property. The Letter of Summary Dismissal was produced and marked 'RSS4'.

35. The Respondent reiterated his case in the written submissions filed on 22nd April, 2009 and prays the suit be dismissed with costs.

Determination

36. The issues for determination are as follows –

(i) Was the Respondent in the employ of the defendant at any one time or at all.

(ii) If the answer to (i) above is in the affirmative, did the defendant violate the rights of the Plaintiff as set out in this suit.

(iii) What remedies, if any, are available to the plaintiff.

Issue i & ii

37. The court will deal with issues (i) & (ii) simultaneously.

38. It is not in dispute that the Respondent served the same two companies with the Respondent in different periods covered in this suit. The onus of proving this fact of employment and violation of the rights of plaintiff rests on the plaintiff on a balance of probabilities in terms of sections 107, 108, 109 and 112 of the Evidence Act cap 80 of the Laws of Kenya.

39. The defendant has successfully rebutted the allegations made by the plaintiff that he at any one time was her employer and that he had dismissed her from his employment.

40. The Plaintiff failed to produce any documents showing that the Respondent ran any business in his personal capacity. On the contrary, the Respondent has ably demonstrated that the plaintiff initially worked for a family business owned by a limited liability company in which the Respondent was not a shareholder.

41. Secondly, the Respondent ably demonstrated that the plaintiff was subsequently employed by specialized Air Conditioning Limited, in which the defendant was a shareholder and it's Managing Director.

42. The Plaintiff was summarily dismissed by the said company on 22nd November, 2004, by a letter of the same date signed by the Respondent on the company letter head.

43. Clearly, the Plaintiff has failed to disclose any cause of action based on employment relationship against the Respondent personally. Consequently, the case of unlawful dismissal from employment by the Plaintiff against the Respondent is a non-starter and same is dismissed.

44. As regards violation of human dignity, by being deliberately infected with HIV Aids by the Respondent while he was his supervisor at work and a lover at the same time, the Respondent has produced scientific evidence to show that he was HIV negative and therefore could not have infected the Plaintiff with HIV.

45. With regard to the allegations of discrimination at work based on the plaintiffs HIV status, the case is not suited against the Respondent. This suit ought to have been brought against the employer with the Respondent as a co-defendant if at all. Again, the Respondent has ably discredited the narrative by the plaintiff, to the effect that he had infected her with HIV virus and subsequently dismissed her from employment due to her status.

46. The documentary evidence produced by the defendant, rebutted the Plaintiff's case fully. The court finds that the Claimant has failed to prove on a balance of probabilities that the Respondent employed the Claimant nor unlawfully dismissed her from her employment with the stated companies

47. What is without a doubt is that there was an emotional relationship between the plaintiff and the Respondent which may not be fully

explained by their having worked together for two different companies. The many Criminal complaints by each of them against the other is a pointer to this untoward relationship. It is difficult to tell if any cause of action that may have arisen from this relationship falls or not within the jurisdiction of this court.

48. This suit however, is unmerited as against the Respondent and is dismissed.

49. Due to these peculiar circumstances between the Plaintiff and the Respondent alluded to above, the court makes no order as to costs.

Dated and Signed in Kisumu this 23rd day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of March ,2018

Maureen Onyango

Judge

Appearances

Rachier & Amollo Advocates for Plaintiffs

E. M. Wachira & Co. for Defendant

Anne Njung'e – Court Clerk