



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 968 OF 2016

WINNIE MGHOI RONDO-OBINJU.....CLAIMANT

VS

CHINA CIVIL ENGINEERING CONSTRUCTION

CORPORATION (KENYA) LTD.....RESPONDENT

JUDGMENT

Introduction

1. This dispute arises from the terms of an employment contract between Winnie Mghoi Rondo-Obinju and China Civil Engineering Construction Corporation (Kenya) Limited. The claim is documented by a Memorandum of Claim dated 20th December 2016 and filed in court on even date. The Respondent's defence is contained in a Response dated 8th February 2017 and filed in court on 14th February 2017.

2. The matter came up for hearing on 25th January 2018 when the Claimant testified on her own behalf. The Respondent called its Human Resource Manager, Penina Kung'u. Both parties filed written submissions.

The Claimant's Case

3. By letter dated 26th February 2016, the Respondent offered the Claimant employment in the position of Legal Officer. The Claimant accepted the offer and commenced work immediately. The Claimant avers that according to her appointment letter, she was confirmed in her position from 26th February 2016 and she was to be issued with a draft employment contract for her approval.

4. She was issued with a job card showing that her employment would run from 26th February 2016 until 26th February 2017. The Claimant pleads that after issuing her with the job card, the Respondent's Management learnt that she was pregnant and became indifferent towards her and started looking for ways to terminate her employment.

5. Sometime in June 2016, the Respondent issued the Claimant with a draft employment contract which provided for a four (4) months' probation period. The Claimant contends that this was contrary to the normal three (3) months' probation period given to the Respondent's employees.

6. The Claimant protested at the turn of events upon which her employment was terminated on the ground that she had refused to sign her contract of employment. It is the Claimant's case that the real reason for the termination of her employment was her pregnancy. She pleads that the termination amounted to

discrimination and an unfair labour practice as defined in Article 41 of the Constitution and Section 46 of the Employment Act.

7. The Claimant further states that the Respondent violated Section 41 of the Employment Act as she was not afforded an opportunity to be heard prior to her termination.

8. The Claimant avers that she was unlawfully and unfairly terminated and therefore claims the following:

- a) A declaration that the termination of her employment was unlawful and unfair
- b) A declaration that the termination of her employment on account of pregnancy amounts to an unfair labour practice contrary to Article 41 of the Constitution of Kenya, 2010
- c) 12 months' salary as compensation.....Kshs.1,440,000
- d) House allowance.....432,000
- e) Punitive damages for termination on account of pregnancy
- f) Damages for violation of her rights to fair labour practice
- g) Costs plus interest

The Respondent's Case

9. In its Response dated 8th February 2017 and filed in court on 14th February 2017, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim but adds that the Claimant was given a four (4) months' probation period with effect from 26th February 2016. The Respondent states that the Claimant was to accept the terms of the contract of employment before expiry of the probation period.

10. The Respondent further states that it was the responsibility of the Claimant as the Legal officer, together with the Human Resource Manager to come up with a draft of the contracts of employment for all employees, including themselves, for approval by Management. The Respondent avers that the two officers took up to June 2016 to discharge this responsibility.

11. Regarding the probation period, the Respondent states that the four (4) months given to the Claimant and the Human Resource Manager were within the provisions of the law.

12. The Respondent goes on to state that in spite of the Claimant having drafted the employment contract and the probation period having been within the law, the Claimant decided to reject the probation period as a result of which her contract was terminated during the probation period. The Respondent adds that the Claimant was duly paid her accrued dues.

13. The Respondent denies the Claimant's claim that her termination was as a result of her pregnancy and states that it was not aware that the Claimant was pregnant.

14. In response to the claim for house allowance, the Respondent states that the Claimant was paid an all-inclusive salary of Kshs. 120,000, in addition to overtime compensation.

Findings and Determination

15. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

The Termination

16. The Claimant's employment was terminated by letter dated 27th June 2016 stating as follows:

"Dear Winnie,

RE: RESPONSE TO YOUR EMPLOYMENT CONTRACT

The company respects your decision for declining (sic) to sign the contract on the grounds that clause 2 which is about probation was not negotiated and agreed to, and you will only be agreeable to signing the employment contract upon deletion of clause 2.

According to the employment Act section 41(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 company offered you 4 months probation which is in accordance with the law. According to the letter on offer of employment as a legal officer you were to receive a copy of the employment contract for your perusal and approval.

Due to your decline on (sic) the terms of the employment contract the employment contract is not binding hence you cannot continue representing the company as the legal officer with effect from 28th June 2016.

You are therefore required to handover any information/tools belonging to the company to your immediate supervisor, after which your final dues will be calculated, this includes Days worked, pro-rata leave and salary in lieu.

We wish you all the best in your endeavors.

Yours Faithfully,

(Signed)

Head Human Resource

Penina Kung'u"

17. My reading of this letter is that the termination of the Claimant's employment was triggered by her failure to sign the contract of employment issued to her 13th June 2016. In her internal memo dated 14th June 2016, the Claimant objected to clause 2 of the said contract which effectively placed her on probation for a period of four (4) months.

18. In her testimony before the Court, the Claimant stated that she had read mischief in the inclusion of the said clause which, according to her, had betrayed the Respondent's intention to terminate her employment on probationary terms. She went further to cite her pregnancy as the real reason for the termination.

19. The Claimant's entry into the Respondent's employment was evidenced by a letter of appointment dated 16th February 2016 reproduced hereunder:

"Dear Winnie,

RE: LETTER OF APPOINTMENT AS A LEGAL OFFICER

*We refer to the interview held at our offices on 22nd February 2016 and are pleased to confirm your employment as a Legal Officer in our Company with effect from **26th February 2016**.*

A draft copy of the Employment contract shall be availed to you shortly for your perusal and approval.

We look forward to a long and successful association.

Yours Faithfully,

(Signed)

Zeng Xiangpei

Project Manager

China Civil Engineering Construction Corporation (Kenya) Limited”

20. The letter of appointment contemplated a contract of employment to be issued shortly. There was however no mention of any probation period at this stage. The question now before the Court is whether a probation term could legitimately be introduced post appointment, without the Claimant’s concurrence.

21. In the final submissions filed on behalf of the Respondent on 12th February 2018, it was correctly submitted that the probation period constitutes a trial period during which a new employee is tested for suitability. It is for this reason that probationary appointments do not enjoy the procedural fairness requirements cover provided under Section 41 of the Employment Act.

22. In this regard, the Court was referred to the decision in **Danish Jalang’o & another v Amicabre Travel Services Limited [2014] eKLR** where it was held that the substantive and procedural fairness safeguards provided under Sections 41, 43 and 45 of the Employment Act are not applicable in probationary contracts.

23. Additionally, under Section 42(4) of the Act, the notice period for termination of probationary contracts is placed at seven (7) days as opposed to thirty (30) days for regular contracts.

24. What emerges from this analysis is that employees on probationary contracts are exposed to unfavorable terms of employment. In my view, it is for this reason that the law not only limits the probation period but also requires that a probation contract be in writing so as to put the employee on notice that for the duration of probation, they are exposed to the vagaries of premature termination without due process.

25. In the Claimant’s case, probation was introduced at the tail end of the stated period of four months. This raised the antennas of the Court on two scores; first, the probation term was issued retrospectively and second, the four month period was inconsistent with obtaining company practice of three (3) months’ probation period. Instructively, the Respondent’s Head of Human Resource, Penina Kung’u told the Court that she herself had taken issue with this departure from company practice.

26. In a nutshell, the Court finds that the Respondent’s decision to introduce a probation clause more than three months into the Claimant’s employment was unilateral and in violation of Sections 10(5) and 13(1) of the Employment Act. In **David Njuguna Mwangi v De La Rue Currency and Security Limited [2017] eKLR** this Court held that failure to follow instructions based on unilateral variation of the terms of employment cannot pass as a valid reason for termination of employment. I have no reason to change my position on this matter and consequently find that the termination of the Claimant’s employment was both substantively and procedurally unfair and she is entitled to compensation.

Remedies

27. For the foregoing reasons, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Respondent's conduct, which effectively forced the Claimant out of employment prematurely. I have tempered this with the Claimant's length of service.

28. In the foregoing parts of this judgment, the Court found that the clause on probation had been unprocedurally introduced. The corollary is that the seven days' termination notice which is applicable to probationary contracts was misplaced. For this reason, I award the Claimant one (1) month's salary in lieu of notice as provided under Section 35(1) (c) of the Employment Act.

29. The Claimant also claims house allowance. Section 31(1) and (2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

30. From the Claimant's pay slip filed in court, it is evident that the Claimant earned a basic salary of Kshs. 120,000. There was therefore no expressed intention between the parties that the salary paid to her was inclusive of house allowance. Consequently, I allow the claim for house allowance a 15% of basic salary and adopt the resultant figure of Kshs. 138,000 as the Claimant's salary for purposes of this claim.

31. The Claimant further claims damages for termination of employment on account of pregnancy. On this head, the Claimant relied on Section 5(3) of the Employment Act, which outlaws direct or indirect discrimination on a number of grounds, including pregnancy. The Court was referred to the decision in ***GMV v Bank of Africa Kenya Limited [2013] eKLR*** where it was held that in pursuing a claim of discrimination on account of pregnancy under Section 5(3) all the Claimant is required to do is to:

- a) Establish that she belongs to the protected class;
- b) Demonstrate that she qualified for the job lost;
- c) Show that she suffered adverse employment action as a result of pregnancy and prove that explanations given by the employer are pretextual and that the real reason for termination was the pregnancy;
- d) Establish a nexus between the adverse employment decision and the pregnancy.

32. Granted that the Claimant was pregnant at the time she let the Respondent's employment, the Court did not find any nexus between her pregnancy and the termination. The claim for damages on this ground therefore fails and is dismissed.

33. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 828,000

b) 1 month's salary in lieu of notice.....	138,000
c) House allowance for 4 months.....	<u>72,000</u>
Total.....	1,038,000

34. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.

35. The Claimant will have the costs of the case.

36. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF MARCH 2018

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JUDGE

Appearance:

Mr. Wafula for the Claimant

Mr. Omwenga for the Respondent