



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 300 OF 2014

HELLEN MINOO MUNGUTI.....CLAIMANT

VERSUS

ITALBUILD IMPORTS LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as Senior Accountant on 3.7.2013. The first three months were supposed to be probation but the probation period was extended by a further three months. The claimant accepted the extension and sought maternity leave of 90 days from 13.1.2014 and requested that her probation evaluation be postponed to the period between April and July 2014. The maternity leave and the postponement of the evaluation was granted but on 6.1.2014, the Claimant was served with 7 days termination notice by the respondent on allegation of poor performance. The Claimant was aggrieved and brought this suit alleging that she was unfairly dismissed because of her pregnancy and prayed for reinstatement to her employment with full benefits, 3 months maternity leave, damages for unfair termination, damages for unfair victimization and lock out, costs and interest.

2. The respondent denied the alleged unfair termination and averred the claimant was dismissed for poor performance and incompetence and not because of her pregnancy. She further averred that the termination was done after following a fair procedure. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 10.4.2018 when the claimant testified as CW1 and the respondent called her Managing Director Mr Vittorio Veneziani and her Chief Accountant Mr Onesmus Kalani who testified as RW 1 and RW 2 respectively. Thereafter both parties filed written submissions.

Analysis and Determination

4. There is no dispute that the claimant was employed by the respondent as a Senior Accountant but she was discharged by notice before the lapse of probation period. The issues for determination are:

(a) Whether the termination was unfair.

(b) Whether the reliefs sought shall be granted.

Unfair termination

5. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, termination was done during the probation period. Under section 42 of the Employment Act, the procedure of according fair hearing to an employee before terminating his services on ground of misconduct, poor performance or physical incapacity is not applicable to employees serving under probation contract. However, that limitation is only in relation to the procedure and not the reasons for the termination.

6. It follows therefore that the legislature did not contemplate that the employees serving under a probation contract shall be terminated without justification. Consequently, under section 43 of the Employment Act, the employer is required to justify the termination of his employee even during probationary contract by proving a valid and fair reason.

Reason for termination

7. In this case the claimant contended that she was terminated because of her pregnancy. That she had sought maternity leave to commence on 13.1.2014 and the same was granted. However, the respondent terminated her services effective the same day when the leave was to commence citing poor performance and incompetence. The respondent cited delayed salary and unjustified payment to suppliers as the reasons for the unsatisfactory performance. The salary allegedly delayed and the unjustified payment of suppliers were not substantiated by evidence. I therefore find and hold that the alleged reason for the termination of the claimant's contract of service was not proved on a balance of probability by the employer as required by section 43 of the Act.

8. In addition, it is my finding that the claimant was terminated because of her pregnancy. The reason for the foregoing view is that RW1 in his evidence in chief stated that his wife had objected to the appointment of the claimant from the start because of her pregnancy but he insisted on employing her since she possessed the required qualifications. That he gave the claimant 3 months' probation and extended it for a further 3 months. That he gave her maternity leave but coincidentally, the day the leave was starting was the same day he terminated her services. On a balance of probability therefore I am satisfied that the claimant's services were terminated due to her pregnancy. Terminating an employee on ground of pregnancy renders the termination unfair outrightly by dint of section 46 of the Act. I therefore return that the termination of the claimant's service herein was unfair.

Reliefs

9. Under section 12 of the Employment and Labour Relations Act, the court can only order reinstatement if 3 years have not lapsed from the day of the separation. In this case, the separation occurred on 13.1.2014 and as such 3 years have lapsed since then. Consequently, I will not order reinstatement under section 49(2) of the Employment Act. I will however award damages under section 49(1) of the Act. I therefore award salary for 7 days in lieu of notice since she was still under probation. The award is based on her monthly salary of Kshs 85,000/=. I also award her 7 months' salary compensation for unfair termination of her contract of services. The reason for granting the said compensation is because the claimant did nothing wrong and she had a reasonable expectation to work upto July 2014 as undertaken by the respondent vide the letter dated 4.12.2013 which extended the probation. I further award her 13 leave days on *prorata* basis. The rest of the reliefs sought are dismissed because the claimant is adequately compensated by the reliefs awarded herein above.

Conclusion and Disposition

10. I have found that the procedure of according hearing to an employee before terminating his or her services on ground of misconduct, poor performance or physical incapacity is not applicable to employee serving under probationary contract. I further found that in any legal proceedings challenging termination, the employer must justify the termination of his employee by proving the reason thereof even where the termination is done during probation period like in this case by dint of section 43, 45 and 47(5) of the Employment Act and in default the termination is unfair. I have also found that terminating an employee on ground of pregnancy renders the termination outrightly unfair.

11. Finally I have found that the termination of the claimant herein was unfair because the respondent has failed to prove that she was a poor performer and incompetent, and agreed with the claimant that the termination was due to the claimant's pregnancy. Consequently I enter judgement for the claimant in the following terms:

<i>(a) 7 days notice</i>	<i>22,884.65</i>
<i>(b) Compensation 7 x 85,000</i>	<i>595,000.00</i>
<i>(c) Leave 13/25 x 73,913 =</i>	<i><u>36,956.50</u></i>
<i>Total</i>	<i><u>654,841.15</u></i>

12. The said award will be paid subject to statutory deductions. The claimant will also have costs and interest at court rates.

Dated, Signed and Delivered in Open Court at Nairobi this 9th day of November, 2018

ONESMUS N. MAKAU

JUDGE