

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1535 OF 2015

CAROLINE MAKANDI MWORIA.....CLAIMANT

- VERSUS -

KENAFRIC INDUSTRIES LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

JUDGMENT

The claimant filed the statement of claim on 01.09.2015 through Ojienda & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Kshs. 1, 652, 400.00 being 6 months' salary from 02.07.2012 to 02.01.2013 Kshs.480, 000.00 and one year compensation Kshs. 1, 172, 400.00.
- b) Interest on 9a) above at court rates.
- c) Any other or further orders that the Honourable Court may deem fit to grant.

The claimant's case is that she was employed by the respondent as a systems administrator by the letter dated 25.06.2012. On 02.07.2012 she reported on duty and upon realization that she was expectant, she was asked not to report on duty until informed. By the letter dated 08.06.2013 the respondents confirmed her employment on permanent and pensionable basis effective 01.07.2013. It is her case that on 29.06.2015 the respondent unlawfully and without justifiable reason purported to terminate her employment under section 44 of the Employment Act, 2007 under the terms, 30 days pay for June 2015; pay for leave days due not taken; and 90 days pay in lieu of termination notice.

The reply to the memorandum of claim was filed on 12.10.2015 through Mogeni & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The **1st issue** for determination is whether the termination was unfair. The respondent's case is that the contract of service was terminated per clause 9 of the contract dated 02.01.2013 and which provided that after the formal confirmation as a contract employee of the company, either party could terminate the agreement by giving the other three months notice or pay in lieu of such notice.

The Court has considered the letter of termination dated 29.06.2015. It states that the management had reviewed the structure of the ICT department resulting in a lean structure for more efficient operations. Thus the claimant's services as ICT Systems Administrator would no longer be required. The letter then proceeded, "**Consequently, the management has decided to terminate your employment under section 44 of the Employment Act 2007 with effect from 1st July 2015. Your last working day will be 30.06.2015.**" The Court finds that the reason for termination was restructuring and therefore amounted to redundancy as defined in the Employment Act, 2007 and to be implemented per section 40 of the Act. The Court therefore finds that the reason for termination was not agreement per the termination clause in the contract of service. To that extent the respondent failed to comply with mandatory provisions of section 40 of the Act. The Court has considered the aggravating factor that the respondent stated that the termination was under section 44 of the Act suggesting that the claimant had engaged in gross misconduct but which was not true. The Court has further considered that the claimant desired to continue in employment. The Court has considered the relatively short period she had served the respondent. The Court has considered the aggravating factor that upon reporting on 02.07.2013 the claimant was asked to go away until informed and it was in view of her being pregnant. The Court finds later in this judgment that the parties appear to have been in some agreement that the claimant was to be away from work but the Court has also considered that the same amounted to unfair labour practice in contravention of section 5(3) of the Employment Act, 2007. Under section 49 of the Act, she is awarded 7 months' gross salaries in compensation for unfair termination at Kshs. 97, 700.00 per month making **Kshs.683, 900.00**.

The claimant prays for payment for salary from 02.07.2012 to 02.01.2013. The injury was continuing and ceasing on 02.01.2013 and the suit was filed on 01.09.2015 long after the 12 months of limitation in section 90 of the Act had lapsed. The Court returns that the claim was time barred. The respondent's witness testified thus, "**Between 02.07.2012 and 02.01.2013 the claimant was not paid because she was not working. She raised no dispute for that period not worked. New contract was signed 02.01.2013. No claims were raised by her on previous 6 months period.**" The Court has considered that evidence and the claimant's evidence that she was told to go away until informed. The Court finds that in absence of reported grievance in that regard, the parties appear to have been in agreement that upon the claimant reporting and being expectant, her probationary period of service would run but she would be on unpaid leave. There is no specific claim for discrimination on account of pregnancy and in this case, the Court returns that the parties appear to have been in an understanding. In any event any injury the claimant may have sustained in that regard has been considered in awarding 7 months compensation under section 49 of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) Payment of **Kshs.683, 900.00** by 31.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 7th December, 2018.

BYRAM ONGAYA

JUDGE