



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 619 OF 2015

BETWEEN

CLAUDINE WANJIKU MBOCE..... CLAIMANT

VERSUS

1. EXON INVESTMENTS LIMITED

2. ATEET JETHA RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Munyithya, Mutugi, Umara & Muzna Advocates for the Claimant

Ndegwa Katisya Sitonik & Associates, Advocates for the Respondent

JUDGMENT

1. The record variously indicates this Cause as Number 618 and 619 of 2015. The Registry has confirmed, at the time of writing this Judgment, that the correct Number is **Cause Number 619 of 2015**. The record shall be corrected to uniformly indicate 619 of 2015.

2. The Claimant filed her Statement of Claim, on the 20th August 2015. She states the 1st Respondent is a registered Company, and the 2nd, its Director. The Claimant was employed as Administration Officer/ Personal Assistant, on 9th December 2013. She earned Kshs. 55,000 per month. She went on maternity leave on 15th September 2014, and expected to return after 90 days of maternity leave. While still on leave, she received a letter of termination from the 2nd Respondent, on 15th December 2014. She states termination was based on pregnancy discrimination. It was unfair and unlawful. She prays for the following orders against the Respondents:-

a) 12 months' salary for unfair termination at Kshs. 660,000.

b) Damages for pregnancy discrimination the equivalent of 12 months' salary at Kshs. 660,000.

c) 3 months' salary based on the remaining months in her contract.

d) 4 days of pending annual leave at Kshs. 10,476.

e) Service pay at Kshs. 39,289

Total.....Kshs. 1,534,762

f) General Damages.

g) Costs.

2. The Respondents filed their joint Response on the 16th November 2015. It is conceded the Claimant was employed by the Respondents, on a fixed term contract, effective 9th March 2014 to 8th March 2015. She was granted 90 days of maternity leave from 15th September 2014, to 13th December 2014. She filled for leave as shown in the Form dated 11th August 2014. Sometime in September 2014, the Respondents discovered the Claimant had been stealing/ misappropriating Respondents' money. The Board met and determined the Claimant is summoned to show cause why she should not be dismissed. She owned up to stealing and paid back the money through cheque. Termination was made well after the Claimant's maternity leave. It was based purely on an act of gross misconduct. Her terminal dues were paid to her through her representative, one David Adagi. She refused to collect her Certificate of Service. The Claim has no merit. Respondents pray for its dismissal with costs to the Respondents.

3. The Claimant gave evidence and rested her case on 20th September 2016. The 2nd Respondent testified for both Respondents on the same date, bringing the hearing to a close.

Claimant's Case

4. She testified she went for maternity leave, on 15th September 2014. She was to return on 15th December 2014. On expiry, she called the 2nd Respondent, asking him to send a Driver to pick her. This was the routine. The 2nd Respondent told the Claimant he would call her the following day. He did not. He asked her to read her e-mail. She opened her e-mail. She was shocked. There was in her e-mail, a letter of termination of employment. There were no reasons given for the decision. There was no appraisal of her performance. There was no hearing.

5. The Claimant did not steal or misappropriate Respondents' money. The 2nd Respondent had requested the Claimant to keep for him cash of Kshs. 59,000. He would ask for it from her later. By the time she went for maternity leave, she still had the money on her, and the 2nd Respondent had not called for it. He told her to continue keeping it. Because she was going on maternity leave, she drew a post-dated cheque of the same amount and left it with the Accountant. It was this cheque the Respondents alleged, was refund by the Claimant of stolen money. She did not steal.

6. 3 months remained before expiry of her contract. She seeks compensation for the balance of her contractual period. She prays for compensation for unfair termination. A female Colleague of hers was dismissed by the Respondents, accused of stealing when she gave birth. The Claimant was dismissed in similar circumstances. She was discriminated on the basis of pregnancy. She was denied lunch and transport when she became pregnant. Previously, these benefits were made available. She had 4 days of pending annual leave on termination.

7. Claudine testified upon cross-examination, that termination was effective on 14th January 2015. She was granted 1 month notice. She was given a cheque for terminal dues, in the sum of Kshs. 55,000. She was on maternity leave between 15th September 2014 and 13th December 2014. The latter day was a Friday. She was to go back to work on Monday, 15th December 2014. The letter of termination itself confirms the Claimant was still on maternity leave. She insisted she was fired while on maternity leave.

She did not know if Kshs. 59,000 entrusted to her was sourced from the Company. The 2nd Respondent was a Director.

8. There was a similar complaint against the Respondents by another female Employee. Claudine did not know if the Employee made a formal complaint. The Employee is not a Witness in the proceedings herein. The Claimant did not see the issue of lunch and transport as comprising discrimination. It was after termination that she felt so. She offered to resign after these incidents but the 2nd Respondent declined her offer. She would not wish to be reinstated.

9. Redirected the Claimant testified the money given to her by the 2nd Respondent, was indicated to belong to the 2nd Respondent, not the 1st Respondent. The cheque issued by the Claimant was not returned. She was to resume duty on the date she received the letter of termination.

Respondents' Case

10. Ateet Dinesh Zeverchand Jetha told the Court he is the Managing Director of 12 Companies in Kenya, among them, the Respondent herein. The Claimant worked for him, as a Personal Assistant. She handled most of his documents. She was introduced to Jetha by her Sister, a Lawyer formerly working for the Respondent. Being his Personal Assistant, she was familiar with most of his affairs. He would occasionally give her money, to keep for him for exigencies.

11. He gave her Kshs. 59,000 this way, and forgot about it. When he remembered about it, and enquired from the Claimant about the money, she did not have a clear response. Pressed, she told Jetha the money was in a fixed deposit account, and would mature on a certain date. She gave him a post-dated cheque of the same amount.

12. He testified on cross –examination that there are 250 Employees working for the 1st Respondent. He supervised about 20 of them directly. The 1st Respondent has a policy on discrimination. Jetha did not have a copy of the document in Court. He did not have Claimant's original contract of employment in Court. The Claimant applied for maternity leave from 15th September 2014, to 15th December 2014. Termination letter issued on 15th December 2014, the date she was set to resume.

13. The letter did not reveal the reason for termination. It stated it was unnecessary to give reasons. Jetha reiterated termination was on the ground of stealing. The Claimant was not issued with a letter of warning. There was no complaint lodged with the Police that she had stolen. She was on maternity leave when the decision was made. Jetha did not see the need for holding a disciplinary hearing.

14. She conceded she stole and gave a post-dated cheque. She did not concede in writing. The Witness did not recall when he realized the money had been embezzled. It was around August 2014. She was still paid her salary for the month. Jetha deliberated with his Brother who is his Co-Director, before terminating the Claimant's contract. It was not necessary to have the Claimant or her Representative in the deliberations.

15. The Claimant was paid terminal dues totaling Kshs. 54,000. The Respondents considered her years of service. Certificate of Service issued. Accounts Office did not have any record of embezzled money. Jetha clarified on redirection that he did not report theft of his money by the Claimant to the Police, because of his close relationship with the Claimant and her Sister. The Claimant refunded the money by way of a cheque. Her Certificate of Service was collected on her behalf by Mr. Adagi. The Respondents pray the Court to dismiss the Claim with costs.

Questions arising

- i. Was the Claimant's contract terminated fairly?
- ii. Was she discriminated against on account of her pregnancy?

- iii. Is she entitled to compensation for unfair termination?
- iv. Is she entitled to damages for pregnancy discrimination?
- v. Who should pay the costs of this Claim?

The Court Finds:-

16. Parties in general agree on the history of the Claimant's employment, the terms and conditions of employment, and that termination was at the instance of the 2nd Respondent. It is agreed termination took place while the Claimant was pregnant.

17. Section 41, 43 and 45 of the Employment Act require the Employer to show valid reason or reasons for termination, and carry out the process fairly.

18. Section 46 of the Employment Act contains what does not constitute fair reasons for dismissal or the imposition of disciplinary penalty. An Employer who justifies termination on any of the reasons given under Section 46 is said to engage in what is termed automatic unfair termination. Among the prohibited grounds for termination under Section 46 is a female Employee's pregnancy, or any reason connected with her pregnancy.

19. The Respondents did not justify termination on the Claimant's pregnancy or on any ground related with her pregnancy. At the outset, there is no ground, to consider there was automatic unfair termination.

20. The reason given by the Respondents in their evidence before the Court was that the Claimant's contract was terminated, after she stole Kshs. 59,000 from Jetha, Director and 2nd Respondent in this Claim.

21. This was not disclosed in the letter of termination. The letter of termination dated 15th December 2014 merely states that the Respondents had decided to terminate the Claimant's contract. No reason is given. The letter states that an Employer is free to terminate an Employee's contract, without giving any reason.

22. The Claimant testified that Jetha had entrusted her Kshs. 59,000 which he would ask from her in event of exigencies. She in her evidence suggested this money had something to do with termination of her contract. The Respondents in their evidence made it clear their decision was based on the Claimant's alleged theft, of Kshs. 59,000. It can safely be concluded that the Respondents terminated the Claimant's contract, on the ground of theft. Was this a valid ground?

23. The Claimant served as Personal Assistant to Jetha. He routinely gave her money to keep for him, outside the ordinary official accounting and financial system, which he would use on exigencies. Both Claimant and Jetha agree this was their arrangement. She would be given money, and would hand over the money to Jetha when he needed it.

24. He handed her Kshs. 59,000 this way. He testified he forgot about the money. When he remembered, and asked for it, she did not give a straightforward explanation. She eventually told him she had deposited the money in a fixed deposit account, and gave him a post-dated cheque. It is this act which Jetha testified, amounted to acknowledgement of theft. The Claimant testified she was going on maternity leave. Jetha had still not asked for the money. She therefore drew him a post-dated cheque in event he needed the money, in her absence.

25. Theft is the felonious taking and removing of personal property, with the intention of depriving the owner of the personal property. The 2nd Respondent entrusted the money to the Claimant. She did not take it from him, or remove it from him. He gave it to her, with no date when he wanted to have the money back. There was no intention on the part of the Claimant to deprive the 2nd Respondent of the

money. Even if she deposited the money in a fixed deposit account as alleged by the 2nd Respondent, the Court does not think this would amount to theft. There was no evidence the 2nd Respondent instructed the Claimant money should not be deposited in the Bank. His instruction was that she hands back the money when needed. He gave her the money and forgot about it, as he had always done. The Claimant explained, and the Court believes her, that she was going on maternity leave, and therefore drew a post-dated cheque, in favour of the 2nd Respondent. This cannot, by any stretch of thought, be seen as an acknowledgement of theft; it was merely a good act by a concerned Personal Assistant, worried that her boss could suffer financial inconvenience, during her prolonged maternity leave.

26. The Respondents continued to pay Claimant's salary, even as they alleged she had embezzled money. There was no report to the Police. The Claimant drew the Cheque voluntarily, without any demands or prosecution, instigated against her by the Respondents. It is difficult to see how the Respondents concluded there was theft. **Termination was not based on valid ground.**

27. Termination took place while the Claimant was on maternity leave. She received the letter of termination when she was meant to return to work. There is no record of a disciplinary process. Jetha testified he did not see the need for a disciplinary hearing. He met his Brother/ Co-Director, and in the absence of the Claimant, decided to terminate the Claimant's contract. The letter of termination did not give reason or reasons for the decision. The Claimant told the Court attempts at further enquiry from Jetha stonewalled. Fair procedure was thrown out of the window. The Respondents did not observe the dictates of procedural fairness under Section 41 and 45 of the Employment Act 2007. **Termination was not based on fair procedure.**

28. Termination was unfair for lack of valid reason, and fairness of procedure. **The Claimant is granted the equivalent of 9 months' gross salary in compensation for unfair termination at Kshs. 495,000.**

29. The next issue is whether she has shown she was discriminated against on the basis of her pregnancy, and whether she merits damages.

30. As discussed above, termination took place while the Claimant was on maternity leave. She was issued the letter of termination, on the date she was set to return. Termination was timed to coincide with the return date. The Court has concluded that the ground stated by the Respondents, in justifying termination was false.

31. The Claimant testified she was not accorded proper transport and lunch facilities by the Respondents, during her pregnancy. These facilities were availed in the period when she was not pregnant. She suggested the Respondent's act in denying her the right to return to work, was the final act of pregnancy discrimination.

32. In **G.M.V. v. Bank of Africa Kenya Limited [2013] e-KLR**, it was concluded that in appropriate circumstances, the trier of facts can reasonably infer the Employer is dissembling to cover up discriminatory purpose.

33. Respondents' evidence on the reason for termination amounts to a false explanation. So false, that the Respondents shied away from restating the reason for termination, in the letter of termination. Read together with the evidence given by the Claimant on pregnancy discrimination, the Court can, and does, reasonably infer the Respondents were merely covering up a discriminatory purpose.

34. Why did the termination process have to coincide with the Claimant's pregnancy? Why did the Respondents not wait until she was done with her maternity leave, and conduct a disciplinary hearing? Why did the 2nd respondent remember the Claimant owed him money, only when the Claimant was pregnant? The Claimant gave an adequate *prima facie* case, on pregnancy discrimination. Called upon to show a non-discriminatory reason for their decision, the Respondents failed. The asserted justification was false. Section 29 [2] of the Employment Act entitled the Claimant to return to her job, or to another suitable job on terms and conditions not less favourable than those which applied before she went on maternity leave. What the Respondents did, at the last hour, was to prevent the Claimant's return to work,

after she had finished maternity leave. This was pregnancy discrimination. There was evidence allowing the trier of facts, to conclude in this case, that the Employer was dissembling to cover up for discriminatory purpose.

35. The Respondents relied on this ***Court's Cause Number 2081 of 2011 between Everlyn Lynn Kagendo v. Statpack Industries Limited [Nairobi]***, where the Court rejected the Claimant's prayer for damages for pregnancy discrimination. In the view of the Court, that decision is distinguishable from the current case. In ***Kagendo*** the Employer stated the reason for termination in the letter of termination. Termination was based on poor performance. There was evidence the Respondent had been raising the issue of poor performance during Kagendo's tenure.

36. The Respondents violated the Claimant's right not to be directly or indirectly discriminated against on account of her pregnancy under Section 5[3] [a] of the Employment Act. They infringed her right to return to work under Section 29[2] of the Employment Act. They violated her right not to be discriminated against on account of her pregnancy, under International Labour Organization Convention 183 of 2000 on Employment Protection & Non-Discrimination, and lastly, violated similar fundamental right under Article 27 [5] of our Constitution. ***The Court is satisfied the Claimant was discriminated against on account of her pregnancy.***

37. Damages for pregnancy discrimination are not limited to 12 months' salary set for compensation for unfair termination, under Section 49 of the Employment Act 2007. The Court explained capping of compensatory awards and instances when the Court goes beyond the capping, in the case of ***G.M.V.*** The Court must shift its mind from linear approach to polycentric socio-economic approach. If it does not, as stated in ***G.M.V.***, and is stuck with the mentality of capping set under the old Industrial Justice System, the objectives and purposes of correcting labour-market failures under the Constitution of Kenya would be defeated. It is not therefore a correct approach to cap damages for pregnancy discrimination to 12 months' salary as the Claimant pleads. Damages for employment discrimination are in the nature of general damages, to be determined by the Court.

38. She pleads for Kshs. 660,000 in damages for pregnancy discrimination. The Court does not find this inordinately high or inordinately low, based on the circumstances of the violation, and grants ***general damages as prayed, at Kshs. 660,000 for pregnancy discrimination.***

39. The Court notes the Claimant was offered her claim of 4 annual leave days and service pay. There is no reason why the Court should order the Respondents to re-offer the same items to the Claimant. She received a cheque for the items, totaling Kshs. 54,000.

40. She is granted the prayer for costs and interest, the latter computed from the date of this Judgment.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Claimant was discriminated against on account of her pregnancy.

c) The Respondents shall pay to the Claimant the equivalent of 9 months' salary in compensation for unfair termination at Kshs. 495,000; and damages for pregnancy discrimination at Kshs. 660,000- total Kshs. 1,155,000.

d) Costs the Claimant.

e) Interest granted at 14% per annum from the date of Judgment.

Dated and delivered at Mombasa this 24th day of February 2017.

James Rika

Judge