



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1750 OF 2016

MARY WANGECHI GITHNJI.....CLAIMANT

VERSUS

ST PAUL'S UNIVERSITY.....RESPONDENT

RULING

1. By a motion dated 29th August, 2016 the claimant sought orders among others that:
 - i. That pending the inter-partes hearing hereof, this honourable court be pleased to issue conservatory orders barring and/or staying the implementation of the respondent's letter dated 28th July, 2016 and reinstating the applicant to her job.
 - ii. That at the inter-partes hearing hereof and pending the hearing and determination of this suit, this honourable court be pleased to issue conservatory orders barring and/or staying the implementation of the respondent's letter dated 28th July, 2016 and reinstating the applicant to her job.
2. The application was supported by the affidavit of the claimant who deponed on the main that:
 - i. That I know of my own knowledge that I was employed by the respondent as an assistant lecturer in the department of business studies effective 1st September, 2011.
 - ii. That having satisfactorily completed my one year probation, I was confirmed on permanent terms in that capacity vide a letter dated 31st October, 2012.
 - iii. That I know of my own knowledge that following my sterling performance and hard work, I was promoted to the position of Lecturer with effect from 1st august, 2014.
 - iv. Further, for me to land that promotion, I underwent an interview on 21st July, 2014
 - v. That following my demonstrated hard work and ability, I was appointed Head of Department of Business Studies on 15th April, 2015.
 - vi. That I am married to one Festus Munene under Kikuyu Customary law.
 - vii. That I also know that I am expectant and due in the month of October, 2016.

viii. That sometime on or about the 13th June, 2016 the Deputy Vice-Chancellor called me to his office and reprimanded me about my pregnancy.

ix. That on 16th June, 2016 the Dean, Faculty of Communication and Business Studies, who was my supervisor, approached me and told me that he had been instructed by the Deputy Vice-chancellor, Academic Affairs, to identify another person to head the department with immediate effect since I was pregnant outside wedlock and was therefore, not suitable to continue heading the department.

x. That I know of my own knowledge that when I approached the Deputy Vice-Chancellor about the above matter, he again reprimanded me about my pregnancy and demanded that I produce evidence of my marriage, so as to justify my pregnancy.

xi. That despite this amounting to invasion of privacy, I nonetheless produced an affidavit, a letter from my father and a letter from my area chief confirming that I was married under Kikuyu Customary Law.

xii. That despite producing evidence to confirm my marriage as demanded by the Deputy Vice-Chancellor, I was forced to resign from my position as head of department which I did on 28th June, 2016 and chose to concentrate on my core duty which is lecturing.

xiii. That one month after being forced to resign from my position as head of department; I received a call from the Human Resources Manager, who informed me that he had a letter addressed to me from the Vice-Chancellor. The said letter was scanned and emailed to me on 28th July, 2016 and it informed me that my employment with the respondent had been terminated and that I was put on a three months termination notice effective August, 2016.

xiv. That I had never had any disciplinary and/or performance issues with the respondent for the entire five years I worked for them and that indeed, it was due to my sterling performance that I was promoted within a short time to head a department.

3. In response to the application, the respondent filed an affidavit through one, Lucy W. Gikeri who deponed on the main that:

a. I am adult female and the Human Resources Manager at the institution named as the Respondent herein and therefore conversant with the matter and I am duly authorized to swear this affidavit.

b. The applicant herein Mary Wangechi Githinji is an employee of the respondent and her current position is that of a lecturer in the Faculty of Business and Communications studies.

c. The applicant was initially appointed as an assistant lecturer at the institution on 1st September 2011 and later promoted as a lecturer on 1st August, 2014.

d. That subsequently on 30th March, 2015 the respondent appointed the applicant as the Head of Department Business Studies and she was based at the institution's Limuru campus with the responsibility of running the said department.

e. That the applicant resigned voluntarily from the position of Head of Department Business Studies on 28th June, 2016 having served in that position for one year following her appointment.

f. That it is therefore not true that the applicant was forced to resign from the said position as she clearly indicated in her resignation letter that she would be away from campus for a long time and that the department needed proper attention especially during the graduation time.

g. Further to paragraph 7 above the applicant indicated that she would take that time to finish her

studies and it is upon that request that the respondent accepted the resignation and communicated to her as such.

h. That the applicant was issued with a termination letter on 28th July, 2016 giving her three (3) months' notice from 1st August, 2016 to 31st October, 2016 as per respondent's separation policy contained on page 62 of the Human Resource Policies and Procedure Manual annexed to the applicant's supporting affidavit.

4. In his submissions in support of the application, Mr Juma for the claimant contended that the reason for termination of the claimant was given as "unavoidable circumstances". The claimant deponed that on 13th June, 2016, she was reprimanded by the respondent about her pregnancy and compelled to resign from her position since the pregnancy was outside wedlock. According to counsel therefore, her client's termination was due to her pregnancy.

5. Mr Juma further submitted that section 43 of the Employment Act requires that an employer gives reasons for termination prior to taking such measures. The termination letter cited unavoidable circumstances. These unavoidable circumstances according to counsel were not particularized. As such no reason was given for the termination. In support of this submission counsel relied on the case of **B. Surinder Singh Kanda Vs The Government of the Federation of Malaysia**.

6. Mr Juma further submitted that Section 5(6) of the Employment Act provided that where there was alleged discrimination, the burden is on the employer to prove no such discrimination occurred. According to counsel, the claimant's allegation for the discrimination did not elicit any reaction from the respondent hence he submitted his client was terminated on account of pregnancy.

7. Wamboi for the respondent submitted that under rule 16(8) of the Court Rules, the court shall not grant ex-parte order which reinstates an employee whose services has been terminated. Counsel further submitted that reinstatement is a substantive remedy hence the law does not contemplate reinstatement as a provisional measure.

8. Ms Wamboi further submitted that to grant the interim orders as sought by the claimant would have the effect of limiting the genuine exercise by the respondent of management functions of at the workplace. According to counsel, whether the claimant's termination was unlawful or unfair cannot be determined at the interlocutory stage. It was a matter to be decided upon full presentation of facts by both parties at the hearing.

9. It is indeed correct that this is an interlocutory application hence the court should be careful not to delve deep into matters which form the substance of the claim or defence thereto. The concern of the court as has been stated several times before is to satisfy itself that the applicant has demonstrated a *prima facie* case with probability of success and that an award of damages would not adequately compensate the applicant if successful in the ultimate. If the court is in doubt, the matter shall be decided on a balance of convenience.

10. The claimant has made very serious allegations against the respondent. She claims her dismissal was on account of her pregnancy and that the respondent allegedly did not approve of her pregnancy since the same was conceived outside wedlock. It was her deposition that she had to furnish evidence that indeed she was married under Kikuyu customary law. The claimant further alleged that she was pressed to resign due to her pregnancy. The respondent has denied these allegations.

11. By a letter dated 28th June, 2015, the claimant requested to resign as Head of Department, she did not indicate in the letter when her resignation ought to take place. The respondent however accepted the resignation and asked the claimant to handover immediately but not later than 1st July, 2016.

12. One month after resignation from her position as Head of Department the claimant was issued with three months' notice of termination of services due to unavoidable circumstances. The Employment Act

obliges an employer to furnish an employee with reasons for which such employees services is being considered for termination. “unavoidable circumstance” as stated by the respondent in its notice of termination is more concealing than revealing. It lends plausibility to the claimant’s’ allegations that her services were being considered for termination on account of her pregnancy.

13. Section 46 of the Employment Act does not consider termination on account of pregnancy as a fair reason. Further section 5 of the Act imposes a duty on the Court to promote equal opportunity in employment in order to eliminate discrimination in employment. If it be true that indeed the claimant’s services were being considered for termination on account of pregnancy then this court has a duty conferred both by the Constitution and Employment Act to prohibit and discourage such a practice.

14. Counsel for the respondent has submitted that if the orders sought by the applicant were granted, they would amount to reinstatement yet rule 16(8) of the rules of Court prohibit granting of ex-parte reinstatement orders where the services of an employee has been terminated. It is true that an order for reinstatement shall not be granted ex-parte where the services of an employee has been terminated but nothing prevents the court from making such an order in appropriate cases after hearing the matter *inter partes*.

15. It is further conceded that just like an interlocutory mandatory injunction, interlocutory reinstatement order may be made but in exceptional and clear cases. It ought to issue in a case where the wrong complaint about is glaring and would not be perpetrated by any reasonable person placed in such circumstances.

16. This case presents to me a clear and obvious case where the respondent is about to act unreasonably and in gross violation of fundamental rights of the claimant at the workplace. The court will therefore confirm the interim orders issued on 30th August, 2016 by Honourable Lady Justice Mbaru pending the hearing and determination of this claim.

17. It is so ordered.

Dated at Nairobi this 17th day of March, 2017

Abuodha J. N.

Judge

Delivered this 17th of March, 2017

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge