



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 122 OF 2013

BETWEEN

EVALINE MUMBUA MUTUKUCLAIMANT

VERSUS

RELIABLE FREIGHT SERVICES LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Christine Kipsang' & Co. Advocates for the Claimant

Ameli Inyang'u & Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Amended Statement of Claim, on the 15th October 2014. She states she was employed by the Respondent as a Truck Driver on 10th August 2011. Her contract was terminated by the Respondent unfairly, on 28th February 2013. As of the date of termination, she earned a monthly salary of Kshs. 21,000.

2. She claims the Respondent discriminated against her on the grounds of sex and pregnancy, and failed to pay her equal pay for work of equal value. Male Employees received higher pay. She applied in writing, to go on maternity leave beginning February 2013, on 24th January 2013. The Respondent declined the application, telling the Claimant to write another letter the day she delivered her baby. She worked until 28th February 2013, and delivered on 1st March 2013.

3. On 19th March 2013, she was called by the Respondent and advised to go and sign a discharge voucher. She was told her services had been terminated. She was offered Kshs. 58,000 as terminal dues. She states, termination was discriminatory, without cause and notice. She was not heard. She was in the course of employment subjected to unwelcome and offensive behaviour of a sexual nature by Respondent's Representative, one Samuel Kariuki. The Respondent made illegal deductions on Claimant's salary. She prays for Judgment against the Respondent for: -

a) 1 month salary in lieu of notice at Kshs. 21,000.

b) Irregular salary deductions at Kshs. 27,600.

c) Unpaid annual leave for 2011/ 2012 and 2012 /2013 at Kshs. 42,000.

Unpaid overtime at Kshs. 567,000.

e) Unpaid salary for the period of maternity leave at Kshs. 63,000.

f) Unpaid tax deductions at Kshs. 35,539

TotalKshs. 735,139

g) A declaration that the Claimant's termination was unlawful, unfair, unjust and discriminative and the same amounts to breach of contract.

h) A declaration that failure by the Respondent to issue the Claimant with a Certificate of Service is unfair, unlawful and attracts penal consequences.

i) Similar declaration as in [h] above with regard to Claimant's underpayments and refundable contributions.

j) General Damages under Section 49 of the Employment Act for unfair termination and discrimination.

k) Costs, Interest and any other suitable relief.

4. The Respondent filed its Statement of Reply on 26th June 2013. Its position is that the Claimant's contract was terminated fairly and lawfully. She had been issued several warnings prior to termination. She did not work any overtime. She was not entitled to any additional annual leave days, having worked for only 1 ½ years and taken 3 months of maternity leave. The Respondent granted her maternity leave on, or about 28th February 2013. She performed her work without reasonable skill and care. She colluded with 3rd Parties to siphon Respondent's fuel. She violated Respondent's tyre policy. There was no discharge voucher signed by any Officer of the Respondent, given to the Claimant. There was no discrimination on any ground. No sexual harassment took place. If the Claimant was sexually harassed, she could have reported to the Police. In its Response to the Amended Claim filed on 6th November 2014, the Respondent states the Claimant was offered remuneration similar to other Employees at her level, regardless of her gender. The Respondent prays the Claim is dismissed with costs to the Respondent.

5. The Claimant gave evidence, and rested her case on the 19th October 2015. Operations Manager Philemon Koko Nyakiti gave evidence for the Respondent, on the same date. Respondent's Accountant and Human Resources Manager gave evidence on 15th November 2016, bringing the hearing to an end. The matter was last mentioned on 6th February 2017 when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

Claimant's Evidence:-

6. She restated the contents of her Pleadings in her evidence before the Court. She is a qualified PSV licensee. She started on a salary of Kshs. 12,000. She agitated for increment. Her last salary was Kshs. 21,000.

7. She applied for maternity leave on 24th January 2013. She was denied maternity leave and told to go on working. She worked up to 28th February 2013. She delivered on 3rd March 2013. She called her Line Managers, Grace and Kariuki, and informed them she had been blessed with a baby. On 16th March 2013, Grace and Kariuki called the Claimant to office to collect her termination letter, and sign discharge

voucher in acknowledgement of receipt of terminal dues. She picked the voucher, photocopied it, but did not sign it.

8. She never went on annual leave. Her work involved driving to Rwanda and Uganda. She did not have rest time. She worked 24 hours a day, 7 days a week, without break. Statutory deductions made on her salary were partly remitted to the relevant statutory body. She was occasionally arrested at the weighbridge in the course of her duty. She would be penalized. The Respondent deducted the penalties levied, from her monthly salary. She did not receive her salary during maternity leave.

9. Cross-examined, she told the Court she was initially employed as a Casual Employee in 2011. She was confirmed after 3 months. She was not issued a written contract. Rules and Regulations of work were communicated to her verbally. She did not write to complain about irregular deductions.

10. She was never issued with warning letters. Weighbridge Officers did not record penalties imposed on the Claimant, because the payments were corrupt in nature. She did not siphon fuel. She worked 24 hours a day, 7 days a week. She testified this is possible. It is not true that she was dismissed for fuel siphoning. Redirected, she stated she did not sign the letter of employment. Terms were given to her orally. She was not responsible for overloading of Respondent's Trucks. It was wrong to make deductions on her salary, to recover what was paid at the weighbridge. Kariuki trashed her application for maternity leave. She drove on timelines given by the Respondent.

Respondent's Evidence:-

11. Nyakiti testified the Respondent issues all Employees with written contracts, detailing the terms and conditions of service. It was the same for the Claimant. Maternity and Paternity leaves were provided for in the contracts given by the Respondent to its Employees. Deductions on her salary were in the form of disciplinary sanctions for breaches, such as where she failed to take care of tyres. She was issued with warning letters in December 2011, and February 2012. She did not improve. The Respondent had no option but to terminate. She was offered terminal dues at Kshs. 58,683.

12. She was not discriminated against on the basis of pregnancy or gender. Starting salary for all Drivers was the same. Drivers, who have worked for long, cannot be paid the same as rate, with the newcomers. She was the only Lady among the Drivers, and was allocated newer Trucks. Drivers cannot drive for 24 hours a day, 7 days a week. They are trained in accordance with the guidelines issued by their professional body. They can only drive a maximum of 9 hours a day.

13. Cross-examined, Nyakiti told the Court termination was based on the warning letters. It took place in the year 2013. There was no other warning letter after February 2012. There was no evidence that the Claimant breached company policy. He emphasized on redirection that the Respondent does not discriminate against Employees on any grounds, little less gender.

14. Kariuki confirmed the Claimant was employed as a Driver by the Respondent. She would ask for excess diesel to drive from Mombasa to Kampala and back. The Respondent assigned 1,200 litres of diesel for the 2,200 km journey. Other Drivers drove without problems. The Claimant would demand for extra fuel. She violated company policy by not thoroughly examining her Trucks' tyres before journeying. She was issued warning letters, and, received and signed the letters in acknowledgement. Deductions on her salary were not made illegally. These were advances paid to her to facilitate her movement at the weighbridge. She was not discriminated against based on gender. Salaries were structured. She was given the newest Trucks. The Respondent acted affirmatively. There was no Driver employed at the same time with her, who earned more salary than she did. Kariuki did not sexually harass her. There were no complaints lodged with the Police. She was not denied her Certificate of Service. She was offered 3 months' maternity leave. Termination was not on the basis of her pregnancy. She was a poor performer. Termination was fair. The Respondent is ready to pay her terminal dues and release her Certificate of Service.

15. Kariuki admitted there were only 2 letters of warning issued to the Claimant, for the entire period she

worked. The letter on tyres related to an isolated incident. It is not unusual to have a tyre burst in long-distance driving. There was no follow up to the second warning letter, which required the Claimant to explain use of 690 litres of diesel. Deductions from Claimant's salary took place even before the warning letters issued. The letter of termination states termination was immediate. No reasons were given for the decision. Kariuki was not aware that the Claimant was not at work, when the decision was made. Rumours had it, that she was on maternity leave. She was not heard before termination. The Claimant left employment on her own volition. She never went on annual leave. On redirection, Kariuki told the Court that the Claimant failed to improve her performance, after various warnings issued to her. The Respondent does not discriminate based on gender.

The Court Finds:-

16. The Court is encountered with a dispute in which, the key Witnesses for both Parties, gave evidence in a way that did their credibility no good. The Claimant insisted she worked 24 hours a day, 7 days a week which is beyond normal human capability. To drive a heavy commercial vehicle, 24 hours a day, 7 days a week, non-stop, would be a paranormal achievement. Kariuki on his part told the Court that the Respondent did not know where the Claimant had gone to, but that rumours had it she was on maternity leave. How can an Employer, whose responsibility it is to issue maternity leave, resort to rumours?

17. Gratefully, there are facts which are largely undisputed, and which the Court can rely on, in making its decision. The Claimant was employed by the Respondent as a Truck Driver on 10th August 2011. There is no question that she was a fully qualified PSV licensed Driver. She went on maternity leave on 28th February 2013, and delivered on 1st March 2013. There is evidence that the Respondent prepared a Discharge Voucher dated 28th February 2013, which the Claimant was required to sign. The evidence by Kariuki was that the Respondent terminated the Claimant's contract, after issuing her 2 warnings. Termination was not pregnancy-related. At the same time, it was the evidence of Kariuki that the Claimant left employment of her own volition. The Court is satisfied termination was at the instance of the Respondent.

18. The Claimant alleges a wide range of acts of discrimination were made against her by the Respondent. In her Pleadings she goes beyond merely asserting pregnancy and gender discrimination, stating she was discriminated against on the basis of ethnic and social origins. She did not provide the Court with any evidence of discrimination based on ethnic or social origins.

19. Similarly, her allegations that she was paid salary less favourable than that paid to her male colleagues; the assertion about not being paid equal pay, for work of equal value, are mere allegations, unsupported by her evidence.

20. The Court has not found evidence of sexual harassment by any Officer of the Respondent, against the Claimant. The Claimant did not say what form alleged sexual harassment took. Was it physical, psychological, emotional? What act was done, what words were spoken, or what innuendos were made, to amount to sexual harassment? The Claimant merely makes a blanket allegation about being sexually harassed by Kariuki, without substantiating by giving facts establishing sexual harassment. Kariuki offered evidence and no question was asked to him, on conduct suggesting any shade of sexual harassment.

21. The Respondent was not able to show valid reason, behind termination of the Claimant's contract. She asserts termination was related to her pregnancy. In the absence of any other objective, and non-discriminatory reason given by the Respondent, the Court is persuaded the Claimant's contract was terminated because of her pregnancy.

22. She had, under the Employment Act 2007, the right to go on 3 months' of maternity leave and return to work at the end of maternity leave, in the same position or a position of comparable stature. She applied for leave in writing on 24th January 2013. Kariuki told her to go on driving, never minding that the Claimant was pregnant and on the verge of giving birth. She went on working and left only about 2 days to the date she delivered. The Respondent ought to have released her earlier in January, instead of

letting the Claimant go on working, driving heavy commercial vehicles, perilously close to the arrival of her baby.

23. Barely days after she had given birth, Kariuki and fleet Manager Grace called the Claimant to receive her termination letter and sign discharge voucher. There were no charges of any nature, presented to the Claimant. There was no hearing of any form. The Claimant was still fresh from the maternity ward. The Discharge Voucher, bears the same date, she went to give birth. It is clear the Respondent considered her gone for good, never to return. She certainly established she was discriminated against on the ground of her pregnancy, and denied the right to return to work, because of her pregnancy.

24. She pleads for damages under Section 49 of the Employment Act which is limited to the equivalent of 12 months' salary in compensation. She states Section 49, affords her damages for unfair termination and discrimination. ***The Court grants her the equivalent of 12 months' salary in compensation for unfair termination and discrimination, as prayed, at Kshs. 252,000.***

25. The deductions made on her salary amounting to Kshs. 27,600 were in the nature of bribery. She was advanced money by the Employer to bribe weighbridge Officers, whenever arrested for overloading. The Respondent would recover what she paid in bribes, from her salary. This was an arrangement involving corruption. The Employer, the Employee and the Government Agency engaged in corruption. The Court cannot order refund to the Claimant of a debt arising from corrupt practices. The Claimant was a willing partner in criminal undertaking. The claim for refund of illegal deductions is declined. There was no evidence to justify refunds of other nature claimed.

26. She worked from August 2011 to February 2013. There was no evidence offered by the Respondent to counter her assertion that she did not go on annual leave. She is granted annual leave pay for 16 months, at 21 days per year. This translates to 28 days of annual leave x daily rate of Kshs. 807 = Kshs. 22,615. ***She is granted annual leave pay at Kshs. 22,615.***

27. The prayer for overtime pay, as stated at the beginning of the findings was not credible and is rejected.

28. The Claimant was entitled to maternity leave of 3 months with full pay. This was not paid anything, because the Respondent delayed her maternity leave, and in the end terminated her contract when she was on maternity. ***She is allowed 3 months' salary she would have earned while on maternity leave at Kshs. 63,000***

29. ***She is granted 1 month salary in lieu of notice at Kshs. 21,000.***

30. ***It is declared termination was unfair and based on pregnancy related discrimination.***

31. Other declaratory orders sought add no value to the Claim and are declined.

32. Certificate of Service to issue.

33. Costs to the Claimant.

34. ***Interest granted at the rate of 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair and based on pregnancy related discrimination.

b) The Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation for unfair termination and discrimination, at Kshs. 252,000; annual leave pay at Kshs. 22,615; 3 months' salary for the period of maternity at Kshs. 63,000; and notice pay at

Kshs. 21,000- total Kshs. 358,615.

c) Certificate of Service to issue.

d) Costs to the Claimant.

e) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge