



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NUMBER 812 OF 2016**

**KATUNGE KIILU .....CLAIMANT**

**VERSUS**

**NATIONAL AIDS CONTROL COUNCIL.....RESPONDENT**

**RULING**

1. By a motion dated 9<sup>th</sup> May 2016, the applicant/claimant sought orders among others that;

i. That a temporary injunction be and is hereby issued restraining the respondent, its servants, employees or anybody else whatsoever from recruiting another employee to perform the duties of Head Communications, Public Relations and Knowledge Management Officer – Beyond Zero Campaign Secretariat – NACC “3” at the National Aids Control Council pending the hearing and determination of this claim.

ii. That an order compelling the respondent to continue paying the claimant her salary while on sick off and or maternity leave pending the hearing and determination of this claim.

2. The application was based on the ground that:

i. The Claimant was employed by the respondent pursuant to a contract of Employment dated April 17, 2015 herein.

ii. Pursuant to commencement of the said contract, the claimant rendered services to respondent diligently, honestly and unreservedly. She served as the Head Communications, Public Relations and Knowledge management Officer – Beyond Zero Campaign Secretariat-NACC “3” at the National Aids Control Council.

iii. Pursuant to a letter dated January 15, 2015 the respondent terminated the claimant’s employment thus forcing her to leave employment purporting that her performance was unsatisfactory.

iv. The claimant avers that she rendered services to the respondent for over six (6) months and therefore the termination after expiry of the probation period was unfair, misconceived and unlawful. Further, upon expiry of six (6) months period, she was legally presumed to be a permanent employee under the said contract and having rendered satisfactory services in the absence of prior advise, within the probation period by the employer.

v. The claimant contends that the respondent failed to follow the HR procedure for dismissal as set out in the NACC HR manual. Further, the claimant is expectant and she duly communicated the same to the respondent's management prior to the said termination. In line with the objectives of "**Beyond Zero Campaign**" a large part of which is Maternal and Child Health, the respondent purported to dismiss the claimant – while she was duly on sick off-solely on account of her pregnancy.

vi. The claimant avers that the respondent's action was contrary to the constitution, the Employment Laws which guarantee protection of employees and safeguarding of human and employee rights.

3. The application was further supported by the affidavit of the applicant who deponed on the main that:

i. That I was employed by the respondent pursuant to a contract of Employment dated April 17, 2015 herein.

ii. That the terms of the said contract were inter alia that:

a. The duration of the contract was three (3) years with effect from the date of reporting.

b. At least 6 months before the end of the three (3) year contract period, I would give a notice to terminate or renew the contract.

iii. That pursuant to a letter dated January 15, 2015 the respondent terminated my employment thus forcing me to leave employment purporting that my performance was unsatisfactory.

iv. That the respondent failed to follow the HR procedure for dismissal as set out in the NACC HR manual. Further, I am expectant and I duly communicated the same to the respondent's management prior to the said termination.

v. That I have suffered great mental and psychological anguish. The manner of my dismissal was capricious, malicious and in bad faith; rendering me incapable to meet my parental responsibilities as well as financial obligations. This has caused me great hardship which has adversely affected my pregnancy.

vi. That upon my termination, the respondent made part payment to me but failed to reinstate me and or to pay my lawful terminal benefits. I pray for the reliefs stated in the claim.

4. The respondent opposed the application and filed a replying affidavit through one Dr Nduku Kilonzo who deponed among others as follows:

i. That I am the Director of the National Aids Control Council the respondent in the application dated 9<sup>th</sup> May, 2016 and have full knowledge and information concerning this matter and capacity aforesaid, I am competent and fully authorized to swear this affidavit on behalf of the respondent.

ii. That it is not true that the applicant rendered excellent or acceptable services as averred under paragraph 3 of her affidavit. Contrary to that, there were numerous commissions or omissions on her part that militated against her continued employment with the respondent and I wish to cite the following

a. As early as her second month in employment ie in July 2015, the applicant had already developed a difficult working relationship with her supervisor due to failure to meet the expectation of her position.

b. On 3<sup>rd</sup> August, 2015 during the application probation period I received communication from the applicant's supervisor alleging insubordination by the applicant.

c. During the period of probation, the applicant absented herself from work and attended activities out of the work station without permission or informing her immediate supervisor, there was manifest show of defiance on her part.

d. That the applicant failed to perform assigned duties despite my intervention. The visibility of the Beyond Zero Campaign had dropped. The following critical assignments were never completed at all even after guidance and remarks on way forward was given. The critical assignments are not done todate;

- The marketing items
- The marketing concept
- The annual report
- Beyond Zero Communication strategy
- The branding plan
- Communication plan including ICT and the new media plan

iii. That within the probation period the applicant was evaluated by her supervisor as provided in the respondents Human Resource Manual. She scored 40.6%.

iv. That following the appraisal, a meeting was held between the applicant's supervisor, the applicant and the Head of Human Resources and Administration. It was noted that the applicant had not met most of her targets despite her commitment to improve.

v. That the NACC (respondent) Finance and Administration Committee during a special meeting held on 10<sup>th</sup> December 2015, reviewed the applicant's appraisal and recommended to the Full Council the relieve of services of the applicant.

vi. That the Full Council made a final decision on 16<sup>th</sup> December 2015 not to confirm the applicant. The implementation of the Council's decisions is done once the minutes of the council have been signed. The signing was delayed as the NACC offices remained closed until 5<sup>th</sup> January 2016.

vii. That at no time did I receive any report of the applicant's pregnancy as required under the Employment Act, and therefore the preposition that the applicant's employment was on account of her pregnancy is untrue.

viii. That in response to paragraph 12, the respondent paid the applicant her lawful dues and I believe more that she was entitled, as follows;

- a. Three months' salary in lieu of notice
- b. Gratuity at the rate of 31% of basic salary for each month worked
- c. Leave earned and not taken.

5. Mr Kurauka for the claimant submitted that the applicant's dismissal was illegal as the procedure as outlined in the NACC Human Resource Manual was not followed. The respondent was bound to follow due process. Counsel further submitted that the decision to terminate the claimant's services was arrived at without consultation of all the parties concerned as well as the patron of the Beyond Zero Campaign.

6. According to counsel, the dismissal was orchestrated by the respondent and claimant's supervisor and only served to embarrass the patron of the campaign as the dismissal went against the tenets of the maternal and child health component of the Beyond Zero Campaign. The procedure outlined in Chapter 5 of the NACC Human Resource Manual was not followed in terminating the applicant's employment. According to counsel therefore, the claimant has established a prima facie case to warrant the granting of the orders sought.

7. Mr Kioko on the other had submitted that the applicant was to be put under probation for a period of six months. It was after completion of the probation period that a confirmation letter was to be issued. According to counsel, it was not in dispute that the applicant was never issued with a confirmation letter. She completed her probation period on 20<sup>th</sup> November, 2015 and a meeting was held between the applicant, her supervisor and Head of Human Resource to review her earlier appraisal and it was the conclusion of the meeting that the applicants' improvement was beyond salvage.

8. Mr Kioko further submitted that although the claimant variously stated that her services were terminated because she was pregnant and that the procedure in the manuals were not followed, she has not guided the court on the procedure cited and further, the court has not been shown evidence that the claimant was expecting a child and that she informed the respondent as required under section 29 of the Employment Act.

9. On the other hand counsel submitted that the respondent fully discharged the onus of proof that the termination was not malicious or unfair as provided under section 45 of the Employment Act. According to Mr Kioko the applicant was variously directed and cautioned by her supervisor over her performance. The applicant never applied for any maternity leave as required by the Employment Act and finally that the applicant was taken through an appraisal process in which she participated. Counsel therefore submitted that the respondent's conduct was demonstrative of a fair employer who was not actuated by malice. In conclusion the claimant had not demonstrated a prima facie case that is likely to succeed to warrant injunctive orders.

10. This is an application for interlocutory injunction seeking the order of the court to interdict the respondent from recruiting another employee to perform the duties previously performed by the claimant pending the hearing and determination of the claim herein. The claimant further sought an interlocutory order compelling the respondent to continue paying the claimant her salary while on sick off and maternity leave pending the hearing and determination of the claim.

11. The interlocutory orders sought are in consonance with one of the orders ultimately sought in the main claim, which is the order for reinstatement however, the claimant has sought in the alternative an order for payment of the balance of the contractual period and gratuity. The claimant further seeks payment of twelve months salary as compensation for unfair termination of services.

12. It is therefore acknowledged by the claimant that some measure of monetary compensation can adequately compensate her if she becomes successful in the ultimate. The court however, will not refuse to issue interlocutory injunction simply because damages can suffice. Injunction can still issue depending on the circumstances of each particular case. Where damages are discernible and could most probably adequately compensate the claimant if successful, the court ought to take into account other compelling factors which make interlocutory injunction the most appropriate order to make in order to do justice in a particular case.

13. The claimant herein was offered a fixed term contract for three years vide a letter dated 17<sup>th</sup> April, 2015. The contract was subject to six months' probation during which it could be terminated by either party without notice or assignment of any reason. According to the claimants, she worked for over six months. Her contract was terminated via a letter dated 15<sup>th</sup> January, 2015 (sic). This must have been typographic error since the meeting at which a decision was made not to confirm the claimant was on 16<sup>th</sup> December, 2015. This was some nine months later or three months over and above the period the claimant's probation period expired. Section 42(2) of the Employment Act provides that probation period shall not be more than six months but may be extended for a further period of not more than six months with the agreement of the employee.

14. The respondent has claimed the claimant was not performing to expectation and that an appraisal was done which confirmed this fact. The respondent however kept the claimant in its services for about three months without communication to her whether her probation period would be extended or not. It is further curious to note that the correspondence which informed the decision not to confirm the claimant was between her and Mr Munene.

15. The same Mr Munene appraised the claimant and commented that the claimant was not performing her work and recommended that he gets another person to work with on the claimant's functions. The claimant on her part remarked that the appraisal was hostile and that Mr Munene remarked that she was the problem in the secretariat. This appraisal was done on 23<sup>rd</sup> November, 2015 almost two months after the expiry of the probation period.

16. The court is aware of the fact that this is an interlocutory application and must be careful not to make comments that might appear conclusive in the matter, however in seeking to assess if the applicant has a prima facie case the court inevitably delves into an interim analysis of the applicant's case.

17. At the full trial there will be an issue whether the claimant was still on probation at the time of termination of her services. There will also be the question of whether in carrying out the termination there existed valid reasons for doing so and if the respondent was under obligation to give reasons for the termination.

18. The court has become of the view that the claimant has demonstrated a prima facie case with probability of success however, damages would adequately compensate her in the event she becomes successful at the main trial. The court therefore does not deem this as a proper case for granting interlocutory injunction. The application is therefore dismissed. Costs to the cause.

19. It is so ordered.

Dated at Nairobi this 28<sup>th</sup> day of April 2017

**Abuodha J. N.**

**Judge**

Delivered this this 16<sup>th</sup> day of June 2017

**In the presence of:-**

Kurauka for the Claimant and

No appearance for the Respondent

**Abuodha J. N.**

**Judge**