



REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR
 RELATIONS COURT AT MOMBASA
 CAUSE NUMBER 321 OF 2015

BETWEEN

KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL
 INSTITUTIONS AND HOSPITAL WORKERS [KUDHEIHA]
CLAIMANT

VERSUS

B.O.M AKAMBA HANDICRAFT INDUSTRY
 COOPERATIVE SOCIETY LIMITED
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Hezron Onuong'a Industrial Relations Officer for the Claimant

Mwangi Njenga & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed this Claim on behalf of its Member [Grievant] Mary Naliaka Wafula, on 15th May 2015. Mary was employed by the Respondent Society as a Shop Assistant/ Sales Clerk on 17th October 2005. She was confirmed on 20th February 2006. She was dismissed by the Respondent on 11th August 2014. She earned a gross monthly salary of Kshs. 22,786 as of the date of dismissal. The Claimant states Grievant's dismissal was unfair, and contrary to the Employment Act 2007 and the CBA regulating the Parties' relationship. The Court is prayed to grant the following orders in favour of the Grievant:-

- a. A declaration that dismissal was unlawful or wrongful.
- b. The Grievant is reinstated without loss of benefits, seniority, privileges, and other benefits.
- c. In the alternative the Respondent pays to the Grievant terminal benefits in accordance with the

CBA, as tabulated in Claimant's schedule A, attached to the Statement of Claim.

d. 12 months' salary in compensation for unfair dismissal.

e. Costs.

f. Interest.

g. Any other orders.

2. The Respondent filed its Response on 25th June 2015. It is conceded the Grievant was employed by the Respondent. She was fairly dismissed by the Respondent for valid reason. She failed to report to work on 13th and 14th May 2012; she did not notify the Respondent she would be going on maternity leave; and went on maternity leave without Respondent's approval. She was issued a letter to show cause, why she should not be disciplined on 1st July 2014. She ignored the letter. She was summarily dismissed on 11th August 2014. She is not entitled to the prayers sought. The Respondent urges the Court to dismiss the Claim with costs.

3. The Grievant gave evidence on 15th June 2017. The Respondent did not call Witnesses and closed its case on the 28th July 2017. The dispute was last mentioned on 29th September 2017, when Parties confirmed filing of their Submissions.

4. The Grievant confirmed details of her employment history, and terms and conditions of service. She earned Kshs. 22,786 as of the date of termination. She was owed 100 off-duty days. She took these days, commencing on 10th January 2014.

5. She was expectant when she took 100 days off –duty break. She was to return to work after 100 days, on 12th May 2014. She returned on 14th May 2014. She applied for maternity leave on this date, 14th May 2014. The Respondent did not answer her application for maternity leave. She went on maternity leave.

6. She received a letter to show cause why, she should not face disciplinary action for allegedly extending off-duty days and for absconding. She was asked to attend Respondent's Board meeting on 3rd July 2014 to explain herself. She was not able to attend the meeting because her child was ill. She called Management and explained her inability to attend the meeting.

7. She was asked to write and explain. She was not able to write, and instead called, explaining herself. Her salary was stopped.

8. She went to see the Manager in August 2014. She saw the Manager who issued her a letter of termination.

9. She consulted her Trade Union who reported the dispute to the Ministry. The Conciliator recommended the Grievant is paid terminal dues as computed by the Respondent at Kshs. 263,434; she is paid 3 month's salary in notice pay; she is paid 10 months' salary as compensation for unfair termination; and paid any outstanding salary owed to her as at the time of the expiry of her off-duty days and maternity leave. The Grievant accepted this recommendation. The Respondent did not.

10. She testified she was aware she was expectant, when she took 100 off-duty days. She informed the Respondent about her pregnancy. She was asked by the Manager to apply for maternity leave in writing. She did this. The Manager was not there when she applied. She dealt with Respondent's Accountant. The Grievant explained why she delayed her return from 100 days off-duty, before she went away again on maternity leave on 14th May 2014. Her child was ill. The Grievant was asked to give written explanation for her absence. She gave verbal explanation. Her application for maternity leave came after she had delivered. Redirected, she testified she had asked to go on maternity leave sometime in February 2014. She was told by the Respondent not to worry; she would still get her maternity leave in the coming days.

She did not apply to go on 100 off-duty days; it was granted to her by the Respondent unilaterally and abruptly. She was dismissed in August 2014. Her salary was stopped in May 2014.

The Court Finds:-

11. The Grievant was employed by the Respondent as Shop Assistant/ Sales Clerk on the date and terms of service shown in her Pleadings.

12. She was granted 100 off-duty days by the Respondent, beginning 10th January 2014. She had not applied for these days. The Respondent advised her that this was to compensate her for overtime hours worked. She was to report back on 12th May 2014.

13. She was pregnant at the time she took off-duty days. She states she had asked to go on maternity leave as early as February 2014. She was advised by the Respondent not to worry, she would still go on maternity leave in the coming days.

14. She delivered her baby while on off-duty days, not on maternity leave.

15. She returned at the end of the 100 days, on 14th May 2014. She ought to have returned on 12th May 2014, but testified she was delayed for 2 days, because her baby was ill.

16. Upon return she immediately applied for her statutory 90 days of maternity leave. She did this in writing, but there was no immediate response from the Respondent. She left without approval of her Employer.

17. While on the unapproved maternity leave, she received a letter from the Respondent, dated 1st July 2014, charging that the Grievant had extended her 100 off-duty days, and absconded. She was called to appear before the Board, but did not do so, because of her maternal obligations.

18. The Respondent stopped her salary.

19. She approached the Respondent in August 2014, who issued her with the letter of summary dismissal. The Respondent justified its decision on the ground that the Grievant had extended her off-duty days, and absconded. It was also stated that the Grievant had refused to obey the proper and lawful directive of the Respondent.

20. Was summary dismissal based on valid reason, and fairly carried out?

21. The Respondent did not give evidence and the Court is at a loss why the Grievant was not allowed to take her maternity leave, when she first applied to do so in February 2014.

22. It similarly unclear why the Respondent opted to have the Grievant compensated for her accumulated overtime hours, with 100 off-duty days, to be utilized while the Grievant was pregnant and due to go on maternity leave.

23. The Grievant was entitled to 90 days of maternity leave with full pay, after she had exhausted 100 off-duty days, in line with Section 29[1] of the Employment Act 2007.

24. She had given her notice with respect to maternity leave, satisfying the requirement of Section 29[4] of the Employment Act 2007, way back in February 2014. She delivered while not on maternity leave, but on off-duty days. This situation was wholly created by the Respondent, who scheduled Grievant's off-duty days, and deferred Grievant's maternity leave in February 2014. Underlying Respondent's arrangement was the expectation that the Grievant ought to have utilized the off-duty days giving birth. It did not appear right to the Respondent that Grievant should go on maternity leave, fast on the heels of 100 off-duty days.

25. When she re-notified the Respondent that she wished to go on maternity leave on 14th May 2014, the Respondent dithered. The Court does not think it was wrong for the Grievant to proceed on maternity leave in the circumstances, without a response from the Employer. It was known to the Respondent that the Grievant had applied for maternity leave earlier. It was known she had delivered while on off-duty days. The Grievant had an infant to take care of.

26. It was needless and quite offensive of the Respondent to write to the Grievant who was nursing an infant, asking her to present herself before Respondent's Board for disciplinary hearing. It was disturbing and way out of line, to stop her salary while she was on maternity leave. How would her absence amount to absconding duty? The Grievant had lawful cause to be away from work.

27. The dispute went before the Conciliator. There were reasonable recommendations made on settlement, which the Respondent rejected.

28. The Court is satisfied dismissal of the Claimant was unfair. It did not conform to the minimum statutory standards set under Section 41, 43 and 45 of the Employment Act 2007.

29. The Court does not think an order of reinstatement is suitable given that over 3 years have passed since the Grievant left employment.

30. *She is granted the equivalent of 10 months' salary in compensation for unfair dismissal, at Kshs. 227,860.*

31. In the letter of summary dismissal dated 11th August 2014, the Respondent offered to pay to the Grievant final dues computed at Kshs. 226,860. ***It is ordered that the Respondent pays terminal dues as offered to the Grievant at Kshs. 226,860.***

32. She was not paid her salary for the months of May, June, July and 11 days in August 2014. ***The Respondent shall pay this computed at Kshs. 77,998.***

33. *Costs to the Claimant.*

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

35. Section 29(1) of the Employment Act 2007 entitled the Grievant to 90 days of maternity leave with full pay. Section 29(2) gave her the right to return to the job she held immediately before she went on maternity leave, or to a reasonably suitable job, on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.

36. The Grievant was successively denied the right to go on maternity leave. She was denied the right to return to her old job, or a commensurate new job. Her salary was stopped. She was required to answer to disciplinary charges while on maternity leave, with an infant to take care of. She eventually lost her job on account of her choice to go on maternity leave without the approval of the Respondent.

37. The Respondent placed the Grievant at a disadvantage on account of her pregnancy. Although the Trade Union which represents her has not expressly pleaded it, there were very grave elements of pregnancy related discrimination. Grievant's rights under Section 5(3)(a), Section 29(1) (2) of the Employment Act 2007, and Article 27 of the Constitution of Kenya were severely impaired.

38. *Under the prayer for any further orders, the Court deems fit to grant, the Grievant is granted general damages for pregnancy-related discrimination, at Kshs. 750,000.*

IN SUM, IT IS ORDERED:-

a. Dismissal was unfair.

b. The Respondent shall pay to the Grievant through the Claimant Union the equivalent of 10 months' salary in compensation for unfair dismissal at Kshs. 227,860; terminal dues as offered at Kshs. 226,860; arrears of salary at Kshs. 77,988; and general damages at Kshs. 750,000, total Kshs. 1,282,708.

c. Costs to the Claimant.

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

Dated and delivered at Mombasa this 15th day of December 2017.

James Rika

Judge