



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1569 OF 2015

MARION MWANGI CLAIMANT

VERSUS

MAGNET VENTURES LIMITED RESPONDENT

JUDGEMENT

1. The issues in dispute is the wrongful, unlawful and unfair termination of employment and discrimination against the Claimant on account of pregnancy.

Claim

2. The Claimant applied for employment with the Respondent through i-recruitment portal and was called for a series of interviews which were successful and was appointed the Account Manager. On 30th June 2014 the Claimant collected her employment contract and the human resource manager instructed her to report to work on 5th July 2014. The Claimant was to report at Enashipai Resort in Naivasha for a managerial workshop which was said crucial for the Claimant to attend so as to understand the proper undertakings of the company and also be interact with the other managers.

5. On 5th July 2014, while the Claimant was at the training in Naivasha, the human resource manager asked her jokingly if she was pregnant, which the Claimant brushed off but on 6th July 2014 the Claimant approached the human resource manager and informed her that she was indeed pregnant but was strong and capable of performing her duties. The Human Resource Manager raised concerns noting that the claimant should have disclosed during the interview but the Claimant noted that such an issue never arose and had it been raised she would have gladly addressed it. The Human Resource Manager advised the Claimant not to report to duty on 7th July 2014 until further instructions from the managing director.

6. On 8th July 2014, the Claimant called the Human Resource Manager to find out when she would resume work but was informed not to report as she would be tired and that she should proceed on leave up until she was done with maternity leave.

7. On 5th January 2015 the Claimant called the Human Resource Manager with information that she was ready to resume work after giving both on 19th October 2014. She was told to report to the office on 15th January 2015 where the Human Resource Manager directed her to report to work on 2nd February 2015 so as to give her time to discuss with the managing director and the Claimant would be called to sign a new contract.

8. On 2nd February 2015, the Claimant got concerned as there was no communication from the

Respondent. She reported to the Respondent about her employment status and was told to wait until appraisals were completed and if something comes along she would be informed. This implied that the Claimant had no work or had been terminated unilaterally. Efforts to follow up have not borne fruits. The Claimant is seeking to address these unfair termination of her employment which has caused mental anguish and loss of career. That it is apparent the action of the Respondent was motivated and based on discrimination on account of pregnancy contrary to article 27 of the constitution and section 43, 46(a) and 29 of the Employment Act.

9. The Claimant is seeking for a declaration that the Respondent violated her constitutional rights and damages. She is seeking;

- a) Outstanding salary from 5th July 2014 to 2nd March 2015 at kshs.900,000.00;
- b) Damages for wrongful termination at Kshs.1,200,000.00;
- c) Pecuniary damages for pecuniary loss and compensation for discrimination at Kshs.24,000,000.00; and
- d) General damages at Kshs.5, 000,000.00.

10. The Claimant is also seeking for a declaration that her termination was unfair and that the Respondent should be compelled to pay one (1) months' notice; unpaid salaries; and costs.

11. In support of her case, the Claimant testified that in 2014 she was looking for a job online when she found the Respondent looking for Account Manager. She knew somebody working with the Respondent and asked for HR contact but was told that the Claimant only recruits through a portal technology application. She sent her resume via the web portal and was called for an interview. Winnie the Human Resource Manager and James called her for an interview. She was called for a second interview with a HR consultant. She was then called for third interview with the Respondent directors when she met Winnie, Robert and Stanley. She got the job.

12. The Claimant was given an offer by Winnie, the Human Resource Manager but they did not agree on the salary. They discussed and arrived at kshs.100, 000.00 plus allowances and airtime. Upon confirmation she would earn fuel allowance at kshs.30, 000.00. Winnie also issued a contract on 30th June 2014 and the Claimant was to start on 1st July 2014. The NRM said that it was crucial for the Claimant to attend the managers meeting to meet and know other staff. The Claimant therefore reported on 5th July 2014 at Enashipai Hotel in Naivasha for the managers meeting. Winnie had called her to give details on the hotel details. When the Claimant collected her contract, Winnie informed her to prepare for the meeting in Naivasha.

13. The Claimant also testified that during the meeting at Naivasha, while in a team meeting with Winnie and others, she was asked if she is pregnant which the Claimant brushed off. The next day, upon thinking of the Human Resource Manager question, the Claimant decided to disclose her pregnancy status to her but the Human Resource Manager insisted that she should have disclosed this at the interview. At the time the time of the interview, the Claimant was 6 months pregnant and the issue was not raised. Winnie told her not to report to work after the naivasha meeting to help her consult with the board and call the Claimant. On 7th July 2014, a Monday there was no call. On Tuesday 8th the Claimant called and Winnie told her not to report and proceed on maternity leave after which she would report for work. That the Claimant would be too tired for the job. There was no indication that the board had approved.

14. In the first week of January 2015, the Claimant called Winnie to follow up and report that she had a baby and willing to resume work. The Claimant was given an appointment where she met Winnie and was directed to report on 2nd February 2015 and the board would change the contract with a new one.

15. While on maternity the Claimant was not paid her salaries. The Human Resource Manager never

called her or issue any new contract. The Claimant sent an email seeking feedback on her reporting date. There was no reply.

16. The Claimant also testified that she felt unfairly treated by the Respondent as the Human Resource Manager was not giving her proper directions. That she had been unilaterally been dismissed from her employment which was unfair. That the reason was due to discrimination on account of her pregnancy and thus is seeking claims set out.

Defence

17. In defence, the Respondent admit that they recruited the Claimant as Account Manager and was issued with letter of appointment dated 30th June 2014. Employment was not confirmed as the Claimant did not successfully complete her probation. The Claimant was to report to work on 5th July 2014 at Enashipai Resort in Naivasha for a training and later to report to the office on 7th July 2014 but failed to do so and since 7th July 2014, the Claimant has not worked for the Respondent.

18. In January 2015 the Claimant called the Human Resource Manager requesting to resume work. However the Claimant had terminated her own contract when she failed to report to work during the probation period. The Claimant had not applied for leave and her actions implied that she was no longer interested in her employment.

19. The defence is also that there was no discrimination against the Claimant as alleged as the Respondent could not terminate the claimant's employment on account of pregnancy and where such employment was terminated, it was during the probation period and thus not entitled to the prayers set out.

20. That the Claimant is not entitled to the orders sought on the reasons that she failed to report to work on 7th July 2014; the Claimant was not able to complete her probation period successfully; she was thus not confirmed into full employment; the Claimant terminated her own employment; and the Respondent had right to terminate such employment during the probation period. The claim should be dismissed with costs.

21. In evidence, the Respondent called Winnie Tumboh the Human Resource Manager who testified that she knows the Claimant after she applied for a job with the Respondent and got recruited upon successful interviews. A contract of employment was issued. The employment was subject to confirmation after 3 months' probation period. The Claimant did not complete her probation and was at work for only 2 days.

22. On 5th July 2014 the Claimant reported at a managers meeting in naivasha. The Claimant was to report at the office on 7th July 2014 but failed to do so. There was no communication until January 2015. The Claimant reported to have given birth. She was asked general questions and if she could come back to work. That she deserted and Respondent could not take her back that the Claimant insisted to have a meeting which was fine and she made a request to resume work but such had been terminated upon desertion. There was no maternity leave given or approved as per Respondent procedures. Such should be documented following application through the line manager to the Human Resource Manager office.

23. Ms Winnie also testified that she did not know that the Claimant was pregnant. She could not approve such maternity leave while not aware of the pregnancy. In January 2015 that is when she learnt the Claimant had given birth. The Claimant terminated her own employment and cannot claim any dues from the Respondent.

24. The Claimant was never paid as she had done no work for the Respondent. At the claimant's interview there was nothing on her pregnancy. At the meeting in naivasha, she did not note that the Claimant was pregnant as she interacted with all staff. When the Claimant was employed, the Respondent took her personal data, telephone number and email and when she deserted work, the Respondent did not follow up. When an employee is absent from work the Respondent is supposed to follow up but in the case of the Claimant she was not followed up because she was not in the Respondent system. The

Claimant deserted work and could not be take through the disciplinary action as she was on probation and had not reported at the office.

Submissions

25. The Claimant submit that there was discrimination against her on grounds of her pregnancy which is contrary to article 27 of the constitution, sections 5 and 46 of the Employment Act and ILO Convention 1958 (No.111) on Discrimination (Employment and Occupation). That only after a day when the Claimant confined in the Human Resource Manager that she was pregnant, she was sent on leave without any documentation. That the Human Resource Manager had asked the Claimant why she had failed to disclose her pregnancy status during her interviews but this had not been an issue. That the constitution and the Employment Act forbid discrimination against any person directly or indirectly and this is one such case and the Claimant is entitled to damages.

26. That the allegations that the Claimant absconded work is not correct as the Respondent had all her data and never called her or issued letter of termination. The defence therefore made is not credible and should be dismissed. The inaction by the Respondent following the Claimant reporting to work is apparent that her pregnancy became an issue leading to her termination. This was contrary to the law. This is a matter the Court has taken seriously and addressed the same by an award of damages as held in **Janine Buss versus GEMS Cambridge International School Limited, Cause No.612 of 2012.**

27. The Claimant also submit that she was unfairly terminated without notice or being given a hearing and or being given reasons. Such is contrary to section 41 of the Employment Act. Even where section 42 of the Employment Act on probation is to be followed, there was no notice. Section 42 of the Employment Act does not operate as an ouster to fair labour relations as held in **Mercy Njoki Karigithi versus Emerald Hotels Resorts & Lodges Ltd, Cause No.337 of 2013 (Njoki's case).** The Respondent violated the claimant's rights in employment which amounted to unfairness pursuant to section 45 of the Employment Act. That the Claimant is entitled to the claims set out.

28. The Respondent also submit that the Claimant terminated her employment with them by absconding duty. The Claimant worked for 2 days but was not at work on 7th July 2014 as was required of her. The allegations that she was on maternity leave is not supported by any evidence. Section 29 of the Employment Act provides for the procedure required of an employee who wishes to take maternity leave which includes written notice. Such an employee has 3 months leave but the Claimant has not explained why she remained absent from work. The effect of absconding duty amounts to repudiation of the contract of employment as held in **BIFU versus Barclays Bank of Kenya Ltd [2014] eKLR.** As such, the absconding employee attracts a serious sanction such as termination of employment as held in **Ephraim John Amwayi versus Mabati Rolling Mills Ltd [2014] eKLR.** and by operation of the law, such employment is terminated as held in **Joseph Njoroge Kiama versus Summer Limited [2014] eKLR.**

29. The Respondent also submit that where the Court finds the Respondent terminate the claimant's employment, such was done during the probation period. The Claimant never completed her probation into confirmation of employment. pursuant to section 42 of the Employment Act, where an employee is terminated while on probation, the employer has no legal duty to give reasons or hearing as provided under section 41 of the Act. The Court in **Danish Jalang'o 7 Another versus Amicabre Travel Services Limited [2014] eKLR (Jalang'o cases)** held that where employment is terminated during the probation period the provisions of section 41 and 43 do not apply. The Court made a distinction between the findings in the case of **Mercy Njoki Karigithi** which had held to the contrary.

30. The Respondent also submit that there was no discrimination against the Claimant on account of pregnancy. Ms Winnie testified that she did not know that the Claimant was pregnant during her interview. Where there is no disclosure, the Respondent should be deemed not to have knowledge of the fact. There is therefore no basis for discrimination. In the case of **Janine Buss** the employer was aware that the employee was pregnant but in this case, such information was not within the respondent's knowledge.

31. On the remedies sought, such are not available to the Claimant. Termination was by the Claimant herself. Where the Court finds there was termination by the respondent, notice pay is one (1) month as such was during probation period. The Claimant never worked for 9 months so as to earn such a wage. On account there was no discrimination against the claimant, no damages or compensation is due.

Determination

Status of claimant's employment;

Whether the Claimant was discriminated against by the respondent; and

Whether there are any remedies.

32. It is common cause that the Claimant has a letter of appointment/employment contract with the Respondent dated 30th June 2014. The Respondent admit that the Claimant reported to work on 5th July 2014 as directed.

33. Under the letter of appointment at clause 12 it states;

12 absence from work

You are expected to contact your line manager as soon as possible should you be absent from work. Wilful absence from work without notifying the company of an acceptable reason for your absence will result in your services being terminated.

34. With the above provision clause 17 regulates separation between the parties thus;

This appointment may be terminated by either party giving a one month notice or pay salary in lieu ...

35. With regard to the probationary terms between the parties, clause 1 set out that either party could terminate the employment relationship upon issuance of 7 days' notice or payment in lieu thereof. The Claimant asserts that she was unilaterally terminated on 2nd February 2015 while the Respondent defence is that the Claimant absconded duty and therefore terminated her own contract.

36. The admission by the Respondent that there is a valid contract of employment with the Claimant is telling. Such contract was issued by the Respondent to the Claimant. Where the Claimant is alleged to have absconded duty, the Respondent has not exercised its right under the terms set out under the contract to terminate the same. Ms Winnie for the Respondent testified that she engaged the Claimant in appointments at her office after the Claimant was employed but does not indicate what she did with her employment contract.

38. The duty is vested upon the employer under section 9 of the Employment Act to set out all terms and conditions of employment for the employee to abide. The law provides thus;

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

39. Such written contract becomes a binding document. Such can be enforced in its terms and conditions. Any changes to the employment contract must comply with section 13 of the Employment Act;

13. (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

40. Any material change to the contract must therefore be in writing and communicated to the employee. To therefore leave the Claimant with her contract and do nothing is not a practice acceptable in law. This is tantamount to having an employee who does not render service but has a valid document to claim under its terms.

41. I find, there exists a valid employment contract between the parties that has not been terminated. The Claimant reported to work with the Respondent as under her contract of employment on 5th July 2014 and not 7th July 2014 as submitted by the Respondent. The Claimant has opted to apply the date of March 2015 as her termination date. This indeed favours the Respondent as no termination of employment took place. Salaries due up to the date referenced by the claimants are due under the contract between the parties.

42. On the above basis, the claimant's employment was subject to confirmation upon completion of probation period. Such period lapsed on 10th October 2014. The probation was not extended. By operation of the law, the Claimant employment was confirmed upon the automatic lapse of the probation period. The reliance upon the provisions of section 42 of the Employment Act does not apply. To use the provisions of section 42 of the Employment Act under the circumstances is to remove responsibility from the Respondent as the employer, who faced with the Claimant being allegedly out of work, failed to issue the necessary notice and lead her on into her probation period undisturbed and until 9 months of such employment lapsed.

43. In my view, the facts behind the Court judgement in the cases of **Jalang'o** and **Njoki** and the claimant's case are different. In Jalang'o he reported to work and complained being made to work with an unroadworthy vehicle. He was dismissed upon being taken through disciplinary process and the Court awarded him compensation for one (1) months. In Njoki her employment letter was revoked after 2 days in employment. In the case of the claimant, she was sent away upon the employer learning that she was pregnant. In the two other cited cases, none allege a discriminatory practice against them whereas this is the core issue for the Claimant herein.

44. To terminate an employee without notice, hearing or giving reasons is an unfair labour practices pursuant to the provisions of section 45 of the Employment Act. The Respondent under the belief that the Claimant had absconded duty kept the contract of employment and did nothing. Ms Winnie who testified that she is the Human Resource Manager of the Respondent I find her to be a senior officer of the Respondent who interviewed the Claimant and ought to have knowledge of procedures in the termination of employment. I find no adherence to the law particularly section 41 or 43 of the Employment Act with regard to issuance of notice or hearing of the Claimant before termination. By the act of commission to do the needful where the Claimant allegedly failed to report to work, by terminating the employment relationship, the Respondent encouraged her on. Such is a practice specifically prohibited under article 41 of the constitution. No employee should be unfairly treated.

45. The Claimant claims that she was discriminated against on the basis of her pregnancy contrary to the constitution and the Employment Act. Indeed article 27 of the constitution prohibits all forms of indirect and direct discrimination against any person thus;

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

...

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

46. The above provisions do not exclude private entities such as the Respondent. no discrimination is allowed in employment and such is given emphasis under section 5(3) of the Employment Act thus;

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment. [Emphasis added].

47. The Employment Act therefore specifically prohibits discrimination against any employee under the set out grounds in recruitment, training, promotion, terms and condition of employment, termination and on all matters arising in employment. such discrimination is set out is very serious terms as where discrimination against any employee occurs, the employer faces a sanction but more fundamentally are the provisions of section 5(7) of the Employment Act that are severe that;

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act omission is not based on any of the grounds specified in this section.

48. The claimant's case is that upon reporting to work on 5th July 2014, the Respondent officer Ms Winnie jokingly asked her if she was pregnant which she brushed off. However with hind set and aware she was starting a new job and she was dealing with a senior officer of the respondent, the Claimant testified that the following day she decided to confide with Winnie as the Human Resource Manager about her pregnancy. That Ms Winnie raised concerns as to why she had not disclosed such information during the interview and that the Claimant response was that the issue had not been raised and thus saw no need to address it.

49. Ms Winnie refutes such claims on the basis that she never asked such a question and that had the issue of the claimant's pregnancy been raised at the interview, such would have been discrimination against her. However, the Respondent conduct in the matter is not innocent.

50. On the evidence by the Claimant that upon disclosing her pregnancy to the HMR there were concerns and that she was told she would be tired while at work, I take it there were specific directions from Ms Winnie as the Human Resource Manager. Such can be confirmed by the failure to summon the Claimant to the office or back to work after the 7th July 2014 when she did not attend work. The absence of the Claimant was with the notice and knowledge of the senior officer dealing with her, the Human Resource Manager. It cannot be that a new employee only attended the training meeting at Enashipai Lodge in Naivasha to joyride on freebies. This cannot be an expense the Respondent would take lightly. For a newly employed staff to fail to attend work deliberately, a reasonable employer would follow the date submitted and make enquiries. The conduct of the Respondent and particularly Ms Winnie is telling. In evidence she testified that;

... I communicated with the Claimant via phone. I called her for her interview through the phone. ... When the Claimant was employed we took her personal data, the telephone number and email address. The Claimant was supposed to be at work on 7th July 2014 but did not report. I did not follow up. As the Human Resource Manager where an employee is absent from work we are supposed to follow up. I did not follow up the Claimant as she was not on the Respondent system.

51. Apart from the witness not being truthful, lying under oath by stating that the Claimant was not in the Respondent system, she admitted to have taken her personal data and contacts. The Claimant attended work for 2 days on the basis that her reporting date was 5th July 2014 pursuant to her contract of employment.

52. I therefore note the serious case made against the Respondent on discrimination against the Claimant is not challenged in any material way. The mere denials do not aid the Respondent at all. I find the

absence of the Claimant from work was not for a justified cause, she was sent away by a senior officer of the Respondent under the stated circumstances of her pregnancy.

53. Respondent procedures required to be followed in the event of seeking maternity leave is not submitted. The procedures with regard to treatment due to absconding duty is equally not attached. The Respondent totally does not set out what procedures are in place in addressing disciplinary matters. Where indeed the Claimant reported on duty for 2 days, at a venue outside of the office as directed, then the duty to show what procedure lapses occurred is upon the Respondent as the employer. It cannot be vested upon the employee such as the Claimant who was newly employed and only had her employment contract.

54. It is apparent that Ms Winnie as the Respondent Human Resource Manager has wide authority as she testified in Court for the Respondent and has been on the job for ten (10) years. I find such time has given her experience and useful lessons in human resource and management matters and the laws regulating employment. This is the officer who interviewed the Claimant and issued her with the employment contract. She further stated that when the Claimant reported back in January 2015;

.... When the Claimant called me in January 2015, she came to the office and we had small talk. That is when I learnt that she had been pregnant. ... I asked her general questions and asked her if she had come back to work. I told her she deserted and could not take her back. She wanted to have a meeting with me and I had no problem. She came to the office and made request to resume work but we had nothing to discuss as the Claimant had deserted. ...

55. Why would a senior officer of the Respondent engage in 'small talk' and 'ask general questions' with an employee who had absconded/deserted duty and fail to issue her with the relevant warning, termination, or dismissal letter as required of such office? The totality of the respondent's sole witness lacks credibility to its core. This left the Claimant lawfully absent from work but for reasons solely at the instance of the Respondent officer upon knowledge that the Claimant was pregnant and this had not been addressed at the interview.

56. Acts of discrimination against an employee need not be overt. The sheer perception that an act is done or conduct amounts to setting apart an employee from others so as to deny an employment benefit is sufficient. In the intricate web of addressing case of discrimination at the workplace, the law went to the extent of specifically setting out that it is not a fair reason for dismissal or for the imposition of a disciplinary penalty against a *female employee's pregnancy, or any reason connected with her pregnancy pursuant to section 46(a) of the Employment Act.*

57. Therefore, on the basis that the Respondent did nothing to discipline the Claimant after 7th July 2014, her absence was sanctioned but for the wrong reason, that of her pregnancy. I find this to be discrimination against the Claimant contrary to the provisions of section 5(3) read together with section 46(a) of the Employment Act. On this basis, sections 5(6) read together with section 88 of the Employment Act apply;

5 (6) An employer who contravenes the provision of the section commits an offence.

And 88. (1) A person, other than a child, who commits an offence under this Act, or contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both.

58. On this basis, where the Respondent is liable to pay a fine not exceeding 50,000.00, such shall be converted into the damages payable to the Claimant for the violation of her right against discrimination in employment. The Claimant is awarded kshs.50, 000.00 in damages.

Remedies

59. On the finding that the claimant's contract of employment remained valid for 9 months, the salaries due are payable. The Claimant is hereby awarded kshs.90, 000.00 in salary arrears not paid.

60. Notice pay of one (1) months as under the contract terms is due as section 35 of the Employment Act was not adhered to. The Claimant is awarded kshs.100, 000.00.

61. Upon the finding that there was unfair termination of employment as under section 45 of the Employment Act, compensation is due. On the basis that the Claimant is awarded unpaid wages and that until August 2015 she had not asked for her salaries as due, the award in that respect is found sufficient.

62. Pecuniary damages are claimed on the basis that this Court in the case of **Janine Buss** awarded compensation at kshs.6, 000,000.00. However each case must be looked at on its own merits. In the referenced case the Court held that the employee had been in the long service of the employer, in this case the Claimant testified that she was at work for 2 days and save for the fact that she holds a valid employment contract, save for the 2 days of work, she proceeded on leave and resumed work in January only to be sent back and forth until February 2015 when it became clear that the Respondent was not keen to have report for work. As such the monies paid in wages for the duration on leave and until termination and the damages set out above at kshs.50, 000.00 are sufficient in this case. I therefore award the Claimant Kshs.50, 000.00 in damages.

Judgement is hereby entered for the Claimant against the Respondent in the following terms;

- 1) A declaration the Claimant was unfairly terminated from her employment with the respondent;**
- 2) A declaration that the Claimant was discriminated against by the respondent;**
 - a) Salaries due awarded at Kshs.900,000.00;**
 - b) Notice pay awarded at Kshs.100,000.00;**
 - c) Damages awarded at Kshs.50,000.00;**
- 3) The Respondent shall issue a Certificate of Service in accordance with section 51 of the Employment Act;**
- 4) Costs of the suit**

Orders accordingly.

Delivered in open court at Nairobi and dated this 22nd day of September 2016.

M. MBARU

JUDGE

In the presence of:

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