



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1297 OF 2010

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th October, 2016)

CHRISTINE INGWALAS EMOKORI CLAIMANT

VERSUS

PENTA TANCOM LIMITEDRESPONDENT

JUDGMENT

1. The Claimant filed this suit through the firm of Wangalwa Oundo & Company seeking compensation for alleged wrongful termination of employment. She stated that on 15th November, 2007, she was employed as a seasonal worker, and subsequently permanently employed by the Respondent vide a letter dated 1.07.2008, attached as “CIE 2”.
2. She avers that on 20.10.2008, she was summarily dismissed from employment without reasonable cause. She alleges on a without prejudice basis that the reason for dismissal was actuated by the fact that she became pregnant while in the Respondent’s employment which was viewed by the Respondent as gross misconduct.
3. It is her further contention that the dismissal was done without regard to rights and benefits accruing to her as a result of which she continues to suffer loss and damage.
4. The Respondent filed a Memorandum of Reply and Counterclaim on 8.8.2011 through the firm of Walker Kontos wherein they admit the employment relationship but deny that the Claimant was wrongfully dismissed. They state that the Claimant was terminated for the reason that she absented herself from her place of work for a period of twenty days without prior notice and/or permission from the Respondent.
5. The Respondent aver that any permanent employee absent from work for a period of two or more consecutive days is required by law, contract of employment and the Respondent’s Company Policy, to produce a certificate of incapacity to work signed by a duly qualified medical practitioner, which the Claimant failed to do.
6. They further allege that the Claimant has filed two different Court cases in different Courts and as such this Court lacks jurisdiction to entertain this matter.
7. In evidence the Claimant led evidence as contained in the Memorandum of Claim and stated that she

was dismissed without cause save that she was pregnant.

8. In cross examination she admitted that she absented herself from work on the grounds that she was unwell. She also stated that in the letter of termination, grounds of dismissal were not explained to her.

9. CW2 was the Claimant's husband who stated that his wife was dismissed for no reason and since he worked for the Respondent also, he asked the reason for her dismissal but instead of getting an answer he was also terminated. In cross examination however, he stated that he was terminated in Y2009 whereas his wife was terminated in Y2008.

10. The Respondent put up one witness one Nicholas Brian Gatumba who stated that he knew the Claimant and that she was dismissed for absenteeism and never produced any certificate from a doctor to prove that she had been unwell. He stated that at the time of termination the Respondent was not aware of any pregnancy.

11. In submissions the Claimant states that her dismissal was unlawful as she was not accorded an opportunity to be heard as provided for in Section 41 of the Employment Act, 2007.

12. They state that no record was produced to prove when the hearing happened and who was present at the said hearing. They state that the Claimant as such was denied the right to a fair hearing as enshrined in Article 50 of the Constitution of Kenya 2010 and Section 41 of the Employment Act, 2007.

13. On behalf of the Claimant it was also submitted that she is entitled to payment in lieu of notice as none was given to her as required under Section 35 of the Employment Act, 2007.

14. They further submit that she should be awarded service pay as she worked for the Respondent from 15th November, 2007, to 20th October, 2008, and she was dismissed unduly when she was ready and willing to continue working. They pray for the Claim to be allowed as drawn.

15. The Respondent submits that the Claimant was lawfully dismissed on grounds of being absent from work for a period of twenty days without authorization.

16. They state that it was term of the contract of employment that she would not remain absent from work without permission from her employer for any other reason other than medical reasons. It is their submission that the Claimant breached a term of employment and as such the suit should not stand.

17. The Respondent further submit that the allegation that the Claimant was dismissed for being pregnant is untrue as the Respondent's policy allowed employees maternity leave and returned to work thereafter.

18. Furthermore they submit that the Claimant was not even aware she was pregnant until 1.11.2008 when she reported to hospital with abdominal pains and it was only upon conducting of tests that it was discovered that she was pregnant. The Claimant was dismissed on 20.10.2008, and therefore pregnancy could not have been a ground of dismissal as alleged.

19. It is also the Respondent's submission that the procedure of the Claimant's termination was regular in terms of Section 45 of the Employment Act as there was a valid ground for dismissal, absenting herself from work for a period of twenty days, and the termination was purely on this ground.

20. The Respondent also submits that the Claimant is not entitled to the prayers sought for the reason that payment in lieu of notice is payable where an employee is dismissed summarily.

21. On 12 months' pay as compensation and damages for summary dismissal the Respondent state that is a replication of prayers and should not be allowed. Further that due procedure was followed in termination of the Claimant's services and as such no damages are payable.

22. Without prejudice to their submission that damages are not payable they submit that in the event the

Court awards damages it should be taken into account the extent to which the employee caused or contributed to her termination, length of service which in the instant case, the Claimant was a probational employee until 1st July, 2008, and was therefore a permanent employee of the Respondent for 2 ½ months only. They state thus, the Claimant is only entitled to minimal damages.

23. They rely on the case of **Mary Mumbi Kariuki vs. Director, Pamoja Women Development Programme (2015) eKLR** where the Court took into account the employee's short length of service and awarded the Claimant the equivalent of two (2) months' salary as damages for unfair termination.

24. They also rely on the case of **Patrick Abuya vs. Institute of Public Accountants of Kenya (ICPAK) & Another (2015)eKLR**; where the employee had worked for 1 ½ years the Court awarded 2 months' salary as damages for unfair termination.

25. The Respondent submits that the chances of the Claimant getting comparable employment are high and this should be taken into consideration when assessing damages payable. They submit that the Claimant is only entitled to nominal damages which should not be more than two months' salary.

26. Having considered evidence of both parties, and submissions filed herein, the issues for determination are as follows:

1. Whether there were valid reasons to warrant dismissal of Claimant.

2. Whether due process was followed before Claimant's dismissal.

3. Whether Claimant is entitled to remedies sought.

27. On the 1st issue, the Respondents have given absenteeism as the reason for dismissal. They aver that the Claimant failed to come to work for 20 days.

28. The Claimant on her part states that she was dismissed for being pregnant.

29. On issue of pregnancy, the documents presented by Claimant show that she was terminated with effect 30.10.2008 vide her letter dated 20.10.2008 (Appendix C1 to 3).

30. However the Claimant visited hospital on 1.11.2008 and was admitted on that day and discharged on 3.11.2008. It is when pregnancy with obstructed ventral hernia was diagnosed.

31. It is therefore not true that the Respondent had knowledge of Claimant's pregnancy before she was dismissed and that assertion by Claimant is not true.

32. On issue of absenteeism, the Claimant has told Court that she fell sick and went for treatment and on coming back she was dismissed.

33. The termination letter is however silent on reasons for the Claimant's termination. Though in oral evidence, the Claimant attributes it to absenteeism, the termination letter is silent on the reasons for the termination.

34. Under Section 43 of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

35. The Respondents are obliged to prove reasons for the dismissal which they did not in 1st place given to the Claimant and so it is my finding that they had no reason to terminate the Claimant's service.

36. On due process, the Claimant was also denied the same as none has been demonstrated by the Respondents.

37. Under Section 45 (2) of Employment Act:

(2) "...A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure."

38. Given that the Claimant was terminated without any proper reason and without due process, I find her termination unfair and unjustified in terms of Section 45(2) of Employment Act and I declare so.

39. I therefore award Claimant the following remedies:

1. 1 months salary in lieu of notice = 4,600/=.

2. 12 months salary as damage for unlawful termination = 12 x 4,600 = 55,200/=.

TOTAL = 59,800/=

3. Respondent to pay costs of this suit.

4. Certificate of Service.

Read in open Court this 12th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent