



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 154 OF 2016

CAROLINE WAMBUI NDERITU.....CLAIMANT

-VERSUS-

DR. IGNATIUS L.M MUTURI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 20th December, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 01.07.2016 through Gori & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Compensation for wrongful dismissal to a maximum of 12 months' wages and general damages emoluments at a rate of 15% of the total which amounts to Kshs.216,000.00.
- b) Damages for lost earnings from December 2014 up to today being monthly earnings at a rate of Kshs.18,000.00 and annual increment of 7% of the salary per annum.
- c) 3 months in lieu of notice totalling to Kshs.54,000.00.
- d) Costs of the suit.
- e) Interest on (a) and (b) until payment in full.

The response to the memorandum of claim was filed on 14.09.2016 through G.K. Kibira & Company Advocates. The respondent prayed that the suit be dismissed with costs to the respondent.

The parties are not in dispute that the respondent employed the claimant as an office messenger from 01.10.2014 to November 2014. The letter of employment was dated 30.09.2014 and the letter stated that the claimant was entitled to Kshs.18,000.00 monthly salary and 30 days per year for annual leave. Prior to that formal appointment the claimant had served on probationary terms following an interview on 14.06.2014 and, as the claimant testified, after undergoing a medical test including confirmation that she was not pregnant.

The **1st issue** in dispute is whether the termination of the claimant's employment was unfair. The claimant's case is that she was dismissed from employment by the respondent's telephone call on 01.11.2014 at about 8.00am. The claimant's case was that the respondent told her that he had terminated her services because she was pregnant. The claimant testified that on 01.11.2014 was a Saturday and the respondent told her not to report on duty on the following Monday.

The claimant's case was that she learned about her two or so weeks' pregnancy in early September 2014. The claimant testified that the respondent had learned about the claimant's pregnancy around that time when the claimant had consulted the respondent, a medical practitioner, when the claimant had a minor complication with the pregnancy.

The respondent's evidence was that on 20.10.2016 there had been a theft at his office and lost a lot of money. The respondent testified that somebody had reported to him that after the theft, the claimant had been talking about going to bank a lot of money. He had called the claimant on 01.11.2014 to ask about the issue of that theft and noticing that she may be investigated in that regard, the respondent testified that the claimant disappeared and deserted duty. The respondent testified that the theft case was reported to the police, the claimant made a statement and never came back on duty.

The respondent testified that the claimant was not subjected to medical check-up or pregnancy test prior to employment but he had asked the claimant about her pregnancy when he noticed that she was obviously pregnant. The respondent testified that the claimant had been dishonest in failing to disclose her pregnancy at the time of her employment.

By the letter dated 15.12.2014 the claimant's advocates wrote for confirmation that the respondent had terminated the claimant's employment and for the terminal dues. The respondent's advocates replied by the letter dated 16.12.2014 and stated in part thus, **"That your client failed to disclose to our client on her interview that she was pregnant, and that she only worked for 60 days and had not completed her probation period, thus her employment had not been confirmed to enable her earn terminal benefits i.e thirty (30) continuous day leave every year."**

The court has considered the evidence. It is clear that if the reason for separation was desertion as alleged by the respondent, nothing prevented the respondent from subjecting the claimant to disciplinary process involving a notice and a hearing on account of the misconduct of absence without leave or reasonable cause as envisaged in section 41 of the Employment Act, 2007. In absence of such disciplinary process, the court returns that the claimant did not desert duty.

The court returns that as per the claimant's account, the respondent dismissed the claimant on phone on account of her pregnancy. The correspondence between the advocates and the respondent's evidence that he questioned the claimant about her pregnancy confirms that the reason for the termination was the claimant's pregnancy. Section 5 of the Employment Act, 2007 and Article 27 (4) of the Constitution outlaw discrimination on account of pregnancy. Section 46 of the Employment Act, 2007 lists termination on account of pregnancy as one of the reasons for unfair termination. The court returns that the termination was unfair for invoking an unconstitutional reason for termination. The court has considered that the claimant had served for a short period of less than one year and in view of the unconstitutional reason for termination, that was an aggravating factor and gross violation of the claimant's freedom from discrimination. The court finds that the respondent is strictly liable for the unfair termination and taking into account the aggravating factor, the claimant is awarded **Kshs.216,000.00** for the unfair termination under section 49 (1) of the Employment Act, 2009. She is further awarded **Kshs. 18,000.00** being one month pay in lieu of the termination notice under section 35 of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. There were no submissions for the claimant on the prayer for lost earnings and the court returns that the prayer will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant **Kshs.234,000.00** by 01.03.2017 failing interest to be payable at court rates from the date of this judgment till full payment.
- b) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this **Tuesday, 20th December, 2016.**

BYRAM ONGAYA

JUDGE