



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 253 OF 2012

BETWEEN

ESTHER WANJIRU MAGU CLAIMANT

VERSUS

STEELPLUS LIMITED RESPONDENT

Rika J [Trial]

J.N. Abuodha J [delivery]

Court Assistant: Edward Kidemi

Ms. Patricia Lelei Advocate, instructed by Mohammed Muigai Advocates for the Claimant

Mr. Orina Advocate, instructed by Orina Onyono Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. This Claim was filed on 20th February 2012. The Statement of Response was filed on 3rd March 2012. The Claimant testified, and closed her case before Hon. Justice Paul Kosgei on 9th July 2012. There seems to have been delay in hearing the balance of the dispute, and in delivery of the decision. Parties had indicated they were negotiating voluntary settlement, and the changes in the Court Personnel too have, not aided an expeditious disposal. The situation is regretted. On 8th July 2014, the Respondent was due to give evidence but did not attend Court. The Court ordered the hearing closed and directed Parties to file their Closing Submissions. It was only the Claimant who bothered to do so, filing her Submissions on 23rd July 2014. The file was then forwarded on the orders of the Principal Judge of the Court to the undersigned trial Judge in Mombasa on the 7th May 2015 for preparation of the Award.

2. The Claimant states, testifies and submits that she was employed by the Respondent Company in October 2009 as a Secretary in the Steel Processing Department, earning a daily rate of Kshs. 350. She worked from Monday to Saturday.

3. She applied for and was granted by the Respondent maternity leave, in April 2011. She was not paid during her maternity leave. She was advised it was not in the Policy of the Company to pay Employees on maternity leave. In August 2011, she sought to return to the Workplace upon expiry of her maternity leave. She was advised by the Respondent she could not return. Her contract was thereby terminated.

4. She holds that termination of her employment was automatically unfair under Section 46 of the Employment Act 2007; it was wrongful as it breached her contract and was not preceded by a notice of termination; and was unfair under Section 41 and 45 of the Employment Act. She prays for the following remedies:-

- a. *A declaration that termination was unfair and wrongful.*
- b. *Damages for wrongful termination at Kshs. 126,000.*
- c. *Compensation for unfair termination the equivalent of 12 months' pay at Kshs. 126,000.*
- d. *3 months' maternity pay at Kshs. 31,500.*
- e. *31 days of pending annual leave.*
- f. *15 days service pays at Kshs. 5,250.*
- g. *Interest on the monetary award from the date of dismissal till payment in full.*
- h. *Costs; and any other suitable remedy.*

5. On cross-examination the Claimant testified she was employed as Secretary, but her contract allowed her to be assigned other duties. She was paid daily at the beginning, but her contract was converted into regular employment under Section 37 of the Employment Act, whereof she started a earning a salary of Kshs. 10,500 per month.

6. She was on probation of 3 months and training of another 3 months. She applied for maternity leave but did not have the application document in Court. She did not work after her leave expired. She communicated to the Respondent asking when she should report for duty. The Respondent did not admit her back. Before she left for her maternity leave, she had a disagreement with the Respondent. She was not advised to go to the Factory and collect her pay every month, in the period of her maternity leave. She was told it was not the policy of the Respondent to pay Employees during their maternity leave. It is not true, the Claimant told the Court, that she had failed to go and collect her pay from the Respondent. Redirected, the Claimant testified she did not handle steel. Her duties comprised handling mail; attending Directors' meetings; and processing wages. She made a demand before filing the Claim; there was no response.

7. The Respondent replies in its Statement of Response that the Claimant was a Casual Employee, earning Kshs. 350 per day. Her contract was not terminated by the Respondent, unfairly, wrongfully or otherwise. She went for maternity leave, and did not return to work. The Respondent filed a Statement by a Witness simply named Mr. Ominde. But as pointed at the outset in this Decision, no evidence of any form was presented by the Respondent at the hearing. The Witness Statement itself offers nothing beyond what is encapsulated in the Statement of Response. The totality of the Respondent's position is that the Claimant did not go back to work after her maternity leave was exhausted.

8. The Claimant submits she was entitled to 3 months of maternity leave with full pay, and had the right to return to the job which she held immediately prior to her maternity leave, or a reasonably suitable job, on terms and conditions not less favourable than those which would have applied had she not been on maternity leave. She bases this submission on Section 29 of the Employment Act 2007. She was deprived of her salary during maternity leave, and denied the right to resume work.

9. She was not given notice of termination as required under Section 35 [c] of the Act. She was not heard under the procedure in Section 41 of the Act. The Respondent did not prove reason, and demonstrate fairness and validity of reason, as demanded by Sections 43 and 45 of the Act. The Respondent failed to give evidence in Court, to justify its decision and contradict the Claimant. The Claimant submits in all circumstances, an Employer must act in accordance with justice and equity.

The Court Finds:-

10. The Claimant was employed by the Respondent Company as a Secretary. She commenced employment on 21st October 2009 as shown in her contract of employment, attached to the Claim. She initially was paid a daily rate of Kshs. 350. She was placed on probation of 3 months, and training of 3 months. She was confirmed and worked up to the date she went on maternity leave, in April of 2011. Termination was in August 2011, almost 2 years after she was employed. The dispute as understood by the Court raises the following questions for the consideration of the Court

- Was the Claimant a Casual Employee?
- Was her contract terminated by the Respondent, and if so was termination on fair and valid grounds?
- Is she entitled to the remedies claimed?

Casual Employee

11. There is no doubt the Claimant was a regular Employee, working as a Secretary for the Respondent. She was involved in the day to day administration of the Respondent's Office; she attended to the Directors' meetings; handled mail; and processed wages. These are not roles which were temporary in nature. She worked in continuity, and had the benefit of 3 months of probation, and 3 months of training. She worked from October 2009 to August 2011. Her role was not peripheral; she was at the centre of the Respondent's operations. The Respondent's assertion that the Claimant was a Casual Employee because she earned a daily rate of Kshs. 350 is therefore without merit. She converted to a regular of Employee under Section 37 of the Employment Act and was paid a monthly rate as at the time of termination.

Termination

12. Parties agree the Claimant went on maternity leave in April 2011, and was to resume work in August of that year. She testified she communicated to the Respondent by phone and writing, asking when she could go back. The Respondent advised it would call her and give her further instructions. The Respondent did not call her back. The Respondent's position is that the Claimant did not return to work at the end of her maternity leave. It was not the Respondent who terminated the Claimant's employment; she left on maternity leave, and decided not to return.

13. Unfortunately the Respondent brought no evidence to back up its position. The Claimant's evidence was adequate. She testified she called her Employer on the phone, asked when to return and was not given any definitive date of return. She claims she also wrote to her Employer asking to return. Unfortunately the Court has not seen such communication on record. The demand letter from her Advocates however, was written in November 2011, 2 months after her maternity leave expired. All the claims brought before the Court, including on the right to return to work, were communicated to the Respondent. There was no reply. There was no invitation to the Claimant to return to work.

14. There is therefore, in the view of the Court, sufficient ground to conclude termination was instigated by the Respondent. The Claimant did not leave on her own volition. She took maternity leave, and was in the end, made to understand by the Employer that she was no longer welcome at the workplace.

Validity and Fairness of Termination

15. Section 41 of the Employment Act requires the Employer to accord the Employee a fair procedure, before making the termination decision. The Respondent obviously did not discharge this obligation. It does not even accept responsibility for termination. Having found termination was at the instigation of the Respondent, it must follow fair procedure was not observed.

Reason for Termination

16. The Respondent had the obligation to demonstrate the reason for termination, and show validity of reason, as required under Section 43 and 45 of the Act. No such reason was shown in the evidence before the Court. The Claimant did not desert her position; she was barred from returning after delivering her

baby.

17. She argues the Respondent terminated her contract for a reason associated with her pregnancy. The Court is persuaded, in the absence of any evidence from the Respondent, that the Respondent terminated the Claimant's contract of employment on the basis of her pregnancy. There is no other explanation why the Respondent would refuse to pay the Claimant during her maternity leave, and subsequently bar her return. The inference was that the Respondent deemed the Claimant's pregnancy and the attendant 3 months' absence unproductive for the business.

18. In the *Industrial Court at Nairobi, Cause Number 1180 of 2010 between Ruth Wanjiru Gichuhi v. Mondeas Limited*, the Court held-

- Discrimination at the workplace on the basis of pregnancy is against the Constitution of Kenya; the Employment Act 2007; and the International Labour Organization [ILO] Convention 183 of 2000 on Employment Protection and Non-Discrimination.
- Section 5[1] of the Employment Act 2007 requires the Court and the Labour Minister to act in combating all forms of discrimination at the workplace.
- Section 5[3] of this law expressly outlaws discrimination on the basis of pregnancy, while Section 29 creates the right of maternity and paternity leave. The Employee is granted such leave with full pay. At the end of the maternity leave, the Employee has the right to return to the same or comparable job.
- Section 46 makes termination based on pregnancy, an automatically unfair decision.

In the Cause above, the Claimant was awarded 12 months' gross salary for unfair termination.

19. In the latter case of *G.M.V. v. Bank of Africa Limited [2013] e-KLR*, the Court restated this pregnancy anti-discrimination law. The Court found that the statutory ceiling of 12 months' compensation for unfair termination set under the Employment Act 2007 could not redress suits for pregnancy discrimination adequately. This form of discrimination offends individual as well as societal values such as: the inherent dignity of the human person and the equality of persons; the right to work and earn equal remuneration; freedom from discrimination; the right to have a family which is the basic unit of the society; and the right to fair labour practices. The Claimant therein was granted damages for pregnancy discrimination, as well as compensation for unfair termination.

Remedies

20. Like Ruth Wanjiru and G.M.V, the Claimant herein Esther Wanjiru Magu lost her job on the basis of her pregnancy. She was barred from resumption of duty because she was an economic burden to the Employer. She was denied her salary during pregnancy because it was thought she was not productive while on maternity leave. She merits damages for pregnancy discrimination, as well as compensation for the economic injury sustained in the unfair termination. The Court is satisfied she ought to have received her full pay during maternity leave. The Claimant did not however, establish the prayers for 31 days of annual leave and for service pay. She said nothing of these in her evidence. The Claim is allowed on the following terms:-

- a. It is declared termination was unfair and wrongful.***
- b. The Respondent shall pay to the Claimant 12 months' salary in damages for pregnancy discrimination at Kshs. 126,000.***
- c. The Respondent shall pay to the Claimant another 12 months' salary in compensation for unfair termination at Kshs. 126,000.***
- d. The Claimant shall be paid her withheld salary of Kshs. 31,500.***
- e. The full amount of Kshs. 283,500 shall be paid to the Claimant by the Respondent within 30***

days of the delivery of this Award.

f. *Costs to the Claimant.*

g. *The Award to attract interest at Court rate, upon expiry of the given 30 days from the date of delivery.*

Dated and Signed at Mombasa this 22nd day of May 2015

James Rika

Judge

Dated, Signed and delivered at Nairobi this 19th day of June 2015

Jorum Nelson Abuodha

Judge