



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1665 OF 2011**

**VERONICA WAMBUI WAWERU .....CLAIMANT**

**VERSUS**

**GREEN BELT MOVEMENT .....RESPONDENT**

**Mr. Ochola for the Claimant.**

**Miss. Mate for the Respondent.**

**JUDGMENT**

By a Memorandum of claim dated 29<sup>th</sup> September, 2011 and filed on same date, the Claimant sought various terminal benefits including, house allowance, severance pay, payment of medical bills, outstanding annual leave and issuance of Certificate of service.

The Claimant further seeks damages for wrongful and unfair termination of employment.

The nub of the matter giving rise to the suit is as follows;

The Claimant was employed by the Respondent on 1<sup>st</sup> July, 2009 as a Legal Counsel at the Respondent's Nairobi office.

The responsibilities of the Claimant included but were not limited to advising the Respondent on administration issues, advocacy networking, environmental law and compliance especially on employment matters.

The Claimant was in continuous employ of the Respondent until the 14<sup>th</sup> January, 2011 when she was declared redundant upon coming from her maternity leave.

The Claimant states that her termination was wrongful, unlawful, unfair and maliciously conceived for the following reasons;

- a. *The reasons given for her termination were not valid and the termination itself was not in terms of a fair procedure contrary to Section 45 of the Employment Act.*

- b. *The provisions of Section 40, regarding retrenchment were not followed in that;*
- i. *Her seniority was disregarded in selecting her for retrenchment;*
  - ii. *The Respondent disregarded skill, ability and reliability in choosing to retain a new legal officer in place of her;*
  - iii. *The Respondent did not act in accordance with justice and equity in terminating her employment;*
  - iv. *The Respondent failed to issue her with a Certificate of Service; and*
  - v. *The Respondent failed to pay her terminal benefits and acted in a malicious manner especially considering that she had just come from maternity leave and the decision was made in her absence.*

The Claimant testified in support of the aforesaid particulars and of significance is the following;

She told the court that prior to going on maternity leave she handed over to a young lawyer **Amy Wanjiru** who had been called in as a standby during her absence. To her utter surprise, her employment was terminated upon her return and Ms. Amy Wanjiru, who was young and inexperienced was retained in her place. She stated this was wrongful and unfair treatment which cannot be justified at all by the respondent.

Furthermore, another young lawyer **Elijah Kibicho** was in Respondent's own witness's words retained as he was related to the founder of the Respondent.

The Claimant denied that Amy Wanjiru was retained to do environment advocacy insisting that she had handed over legal work to her when she went on maternity leave.

It was therefore not true that the Claimant had become redundant, but was simply jettisoned out in favour of a new comer for reasons not known to her.

The Claimant referred to her letter of termination which clearly acknowledged that the Claimant had been busy and engaged in various aspects of legal requirements of the organisation.

The Claimant denied that she was aware of the decision by the donors not to retain an in-house lawyer since most of the legal work was outsourced and pointed to the retention of two (2) young lawyers when she was retrenched.

The Respondent as a sign of malice failed to remit to National Hospital Insurance Fund (NHIF) dues for the month of December, 2009 causing her not to receive crucial health care during the delivery.

That the Respondent through its witness admitted that the intended termination was not notified to the area Labour Officer contrary to **Section 40** of the Employment Act 2007.

To make matters worse, failure to provide her with a Certificate of service made it difficult to get alternative employment upon termination.

The timing of the termination was callous and the Claimant reads malice in it to inflict maximum pain on her. The Respondent had in fact refused to let her go on leave until the day preceding the delivery only to hand her a letter of termination upon her return to work.

The Claimant saw malice in all this, notwithstanding the self, acclaimed "*Pro women*" policy by the Respondent. It is the Claimant's view that she was victimised on account of her pregnancy and replaced while she left for her maternity leave.

The Claimant prays the court to uphold her claims with costs of the suit to be paid by the Respondent.

**Respondent's case.**

The particulars of employment of the Claimant as a legal counsel from 1<sup>st</sup> July, 2009 to 1<sup>st</sup> March, 2011 are admitted.

That on 14<sup>th</sup> February, 2011, the Respondent resolved that legal services would be outsourced. That this followed several meetings held by the Respondent Management Committee with the Claimant where the matter was discussed.

That the Respondent had taken this decision upon considering the donors' views that were not in favour of retaining an in-house lawyer as most of the legal services were outsourced. That the Claimant was consequently declared redundant.

The witnesses for the Respondent insisted that the Claimant was aware of the intention to declare her position redundant one year in advance. The Respondent further denies that Amy Wanjiru was immediately recruited to replace the Claimant stating that though Amy Wanjiru was recruited to hold over for the Claimant while on maternity leave her position with the Respondent was distinct from that of the Claimant.

The Respondent however did not deny that Amy Wanjiru was like, the Claimant, a trained lawyer, though much junior to the Claimant. The Respondent also failed to convincingly refute the evidence by the Claimant that in addition to recruiting Amy Wanjiru, the Respondent subsequently recruited another young lawyer by the name of Elijah Kibicho.

The Respondent also admitted that no notice of intended redundancy was sent to the area Labour Officer.

The Respondent however insists that the termination was well within the terms and conditions of her contract of employment wherein either part could terminate employment by giving notice or paying in lieu thereof.

The Respondent told the court that it had on 11<sup>th</sup> March, 2011 computed final dues for the Claimant in the sum of Kshs.67,318/= which included payment of one month salary in lieu of notice. Severance pay for the years worked and payment in lieu of outstanding leave days but the Claimant had failed to collect.

From the payment form prepared by the Respondent and attached to the Memorandum of response Appendix 'F', the payment was to be effected only upon the Claimant signing a disclaimer that the same was in full settlement and final discharge of all sums due to her and would make no further claims against the Respondent.

Her efforts to have the cheque released by a letter dated 11<sup>th</sup> March, 2011 without signing the disclaimer did not bear fruit hence the letter of demand by the Claimant's advocates dated 21<sup>st</sup> April, 2011.

**Professor Karanja Njoroge**, who testified for the Respondent was an advisor to the late **Professor Wangari Maathai**, the then Chairperson of the Respondent. He subsequently was hired as the Acting Executive Director of the Respondent from 7<sup>th</sup> May, 2010 to 31<sup>st</sup> May, 2012.

He told the court that at the time, the Respondent had 122 salaried employees and it entirely depended on donor funds. The witness produced minutes tending to show that the management committee was uncomfortable for a while in retaining an in-house lawyer whereas most of the legal work was outsourced.

He testified that Prof. Wangari Maathai, had requested him to involve the Claimant in more advocacy work to justify her retention.

He confirmed that the claimant's monthly salary was Kshs.35,000/= per month and her terminal dues included payment of three (3) outstanding leave days of Kshs.4,772/70 and severance pay at 15 days salary for each completed year of service in the sum of Kshs.47,727/= less tax giving a total of Kshs.67,318/=.

He denied the allegations by the Claimant that she was discriminated on account of her pregnancy stating that she went on three months fully paid maternity leave and the management committee did not discuss her pregnancy at all.

He also denied that she was entitled to payment of house allowance stating that she received a consolidated salary in terms of her contract of employment.

With regard to the claim for medical expense incurred during pregnancy in respect of which receipts were produced by the Claimant from various hospitals, he stated that the Respondent remitted NHIF and NSSF for all employees including the Claimant. He produced a document to show that remittances were done even for December, 2009 contrary to the allegation by the Claimant. He denied therefore that the Claimant was entitled to a refund of Kshs.259,236/=.

The witness was hard pressed to explain under intense cross-examination why the minutes he relied on were not signed and why if it was true, the Chairperson had requested that the Claimant be allocated more advocacy work, that did not materialise.

He was also in difficulties to explain why the two young lawyers Amy Wanjiru who was standing in for the Claimant during maternity and Elijah Kibicho, a legal student and a relative of Wangari Maathai were hired upon her retrenchment.

He explained that both were in advocacy, an area which the Chairperson had advised the Claimant should gradually get into to justify her retention. This advice was given on 22<sup>nd</sup> November, 2010, while the Claimant was on maternity leave.

The witness continued that the Claimant was a good and reliable worker with whom the Respondent had no issues of performance or conduct. He claimed that failure to report to the Ministry of Labour was an oversight on his part.

### **Conclusion of fact and law.**

From the facts before court, prayers 21(a) payment in lieu of notice and severance pay have been compromised by fact of payment.

Prayer 21 (b) being a further one month pay in lieu of notice in terms of **Section 40 (1) (f)** of the Employment Act, is misconceived and therefore untenable.

The claim for housing allowance at 15% of the salary the Claimant earned is not supported by her contract of employment and therefore the same is also not sustainable.

With respect to prayer 21 (e) for payment of one month accrued leave, there is no evidence before court to sustain this claim. The Claimant was paid in lieu of three (3) days leave due to her at the time of termination. The claim, is also dismissed.

The claim for refund of medical bills paid by the Claimant during the pendency of pregnancy and delivery is not sustainable in terms of her contract of service.

It is clear that the Respondent had registered her with NHIF and duly remitted the dues accordingly. The employer did not provide further medical cover and is therefore not obliged to meet medical bills associated with her pregnancy and delivery as claimed or at all. This claim is similarly dismissed as is not sustainable under **Section 34 (1)** of the Employment Act.

The only outstanding claim is for maximum compensation in terms of **Section 49 (1) (c)** for wrongful, malicious and unfair dismissal.

The totality of the evidence clearly shows that the Claimant was wrongly targeted for retrenchment on the basis of her pregnancy.

A young lawyer who had been employed as a reliever whilst she was on maternity leave was instead made her replacement.

The evidence by the Claimant in this respect is overwhelming and the explanation by the witness for the Respondent is totally wanting as a justification for what in fact was a wrongful replacement of a senior employee, but a new, less qualified one under the guise of retrenchment.

The Respondent readily admitted that it did not comply with **Section 40(1)** by notifying the Labour Officer, at least one month in advance of the intended retrenchment of the Respondent.

Worse still, the termination was effected whilst she was on maternity leave and needed her employment most.

We agree with the submissions by counsel for the Claimant that the manner of termination was callous to the extreme and was unlawful and unfair. The fact that it was done by a very highly regarded institution and against the better advice of its Chairperson, the late Wangari Maathai makes the conduct of the Executive Director, Professor Karanja more deplorable. The court also agrees with the Claimant that there was malicious intent in the termination itself and the manner in which it was effected.

Accordingly, the termination done under the guise of retrenchment was a violation of **Section 45 (1)** as it was unfair in that the employer has failed to show that it was done for a valid reason in terms of **Section 45 (2) (a)** and also the employer has failed to show that the termination was in terms of a fair procedure in terms of **Section 45 (2) (c)**.

Furthermore, the Claimant over and above discharging her onus under **Section 47 (5)** of the Employment Act, to show that the termination was unlawful, has in addition established violation of **Section 5 (3)** in that the evidence before court clearly shows that the Claimant was discriminated upon by the Managing Director of the Respondent on grounds of pregnancy and thereby terminating her employment wrongfully and unfairly.

Considering all the circumstances of the case above, this is a proper case to award the Claimant maximum compensation for unlawful and unfair termination equivalent to twelve (12) months salary in the sum of Kshs.429,000/=.

The Respondent is to issue the Claimant with a certificate of service forthwith in terms of **Section 51** of the Employment Act, 2007.

The Respondent is also to pay to the Claimant costs of the suit.

***Dated and delivered at Nairobi this 4<sup>th</sup> day of February, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**