



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

PETITION NO. 63 OF 2014

PERIS NYAMBURA KIMANIPETITIONER

VERSUS

ALBIT PETROLIUM LIMITED RESPONDENT

RULING

Onyony Advocate instructed by Onyony & Co. Advocates for the Petitioner

Gunju Advocate instructed by Kinoti & Kibe Co. Advocates for the Respondents

1. The Petitioner, Peris Nyambura Kimani through Notice of Motion filed on 10th October 2014 and brought under a Certificate of Urgency and based on the provisions of Article 22, 23, 26, 27, 41, 50, 159 and 258 of the Constitution and section 5, 9, 10, 17, 18, 19, 20, 35, 37, 43, 44, 45, and 49 of the Employment Act, the Petitioner is seeking for orders that pending the hearing of the Petition there be conservatory orders restraining the Respondent from enforcing the termination letter emailed to her on 7th October 2014. The application is based on grounds and supporting affidavit of the petitioner. The Respondent filed their Replying Affidavit on 22nd October 2014 sworn by Kimeu Kimeu the Respondent Group Human Resources Manager.

2. The orders sought are;

1. *That this application be certified as urgent and that it proceeds ex parte in the first instance*
2. *That pending inter parties hearing, a conservatory order be issued restraining the wrongful, unfair, unlawful summary dismissal of the Petitioner pending the hearing and determination of this petition.*
3. *That pending hearing and determination of this petitioner, the Respondent be restrained and prohibited from employing replacement labour/or other employee in the same position to perform the same or similar work as the petitioner*
4. *That pending hearing and determination of this application the employment of the Petitioner be maintained*
5. *That such or further orders do issue to facilitate just, expeditious, effective, efficient and fair determination of this application and the petition.*

3. The application by the Petitioner is based on the grounds that the Respondent has shown contempt to constitutional and employment laws when they purported to issue a termination letter to the Petitioner via email on the 7th of October 2014 while the Petitioner was on sick off. The Petitioner served the Respondent with her sick off on 6th October 2014 and thus the email sent to her on termination was in ignorance of the applicable constitutional and labour rights of the petitioner. The Petitioner was employed

in January 2014, before the email of 7th October 2014 there was no hearing or reasons given to the Petitioner which has greatly affected the claimant.

4. Other grounds are that the Petitioner was on sick off due to pregnancy complications, she had sought medical attention soon after arriving from a trip abroad where she had been sent by the Respondent and by thus purporting to terminate her for taking sick off to attend to her pregnancy was an act of discrimination against her and contrary to article 27 and section 5 of the Constitution and the Employment Act respectively. The petitioner's pregnancy and health status is at stake, and by purporting to terminate her employment, the Petitioner is acting contrary to the constitution and the applicable law. The Respondent has applied discriminatory employment policy and practices in relation to the petitioner. The summary dismissal should be stopped and the Petitioner allowed continuing with her employment.

5. In her affidavit, the Petitioner stated that by a contract dated 18th November 2013, the Respondent agreed to employ her from 6th January 2014 and was to be on probation for six (6) months. The contract made provision of retention of the probation period upon agreement by the parties. The Petitioner was to retire at age 60. She was entitled to sick leave of 30 days and termination was allowed upon either party giving 3 months' notice or payment in lieu of such notice. On 7th October 2014, the Petitioner received an email with a message that she had been terminated.

6. On 1st June 2014, the Petitioner travelled for work to Zambia. She went back to Zambia on 14th September 2014 and on 1st October travelled back noting that she had a doctor's appointment on 2nd October 2014. The Petitioner was called to the office before she went to her doctor. The Petitioner at the time was five (5) months pregnant and undergoing a medically complicated pregnancy that require support.

7. When the Petitioner saw her doctor, she was advised to take six (6) sick off days from 2nd October. The Petitioner sent a representative to the Respondent to deliver the sick off sheet on her behalf which was submitted on 6th October 2014. Upon such receipt, the Respondent sent an email whose message was a termination of the petitioner's employment.

8. On 3rd October the respondent, through the Group Human Resource officer, Kimeu sent an email to third parties informing them that the Petitioner had left their employment and her duties would be handled by him. This was not copied to the Petitioner she only got to learn this from colleagues.

9. That the purported termination is not only discriminatory, it is done with malicious intent noting the health and pregnancy complications the Petitioner is undergoing and the same meant to injure her and should thus be restrained. The damage the Petitioner will suffer if the respondent's decision is enforced is irreparable, contrary to the internal human resource policy of the respondent; it is contrary to the applicable law and against the constitution that prohibit discrimination, ill-treatment. For access to justice to be ensured, the Respondent should be restrained from enforcing the decision to terminate the petitioner.

10. In reply, the Respondent through their Replying affidavit stated that the Petitioner was employed from 6th January 2014, she was placed on probation for 6 months and this could be extended. Confirmation on the job was only after the Petitioner was assessed, appraised and issued with a letter of confirmation. There was no appraisal and the Petitioner remained on probation until her summary dismissal which was a right the Respondent could exercise in law and under the contract and their human resource policy. During probation the Petitioner was to earn kshs.270, 000.00 and upon confirmation she was to earn kshs.300, 000.00 and in this case the Petitioner continued to earn kshs.270, 000.00 the probationary amount a confirmation that she had never been confirmed.

11. That an employee can be on probation up to 12 months as under section 42 of the Employment Act. The contract of employment made provision for 30 days sick off which was subject to the Petitioner producing a certificate of incapacity signed by a qualified medical practitioner. There was a set procedure before the Petitioner could take the sick off there was no such approval in this case. That while the Petitioner travelled to Zambia, she never brought to the attention to the Respondent that she had a

complicated pregnancy or that she may have been sick upon return on 1st October 2014. The respondent's policy provides for 90 days maternity leave to employees under probation hence there is no discrimination against employees who are pregnant.

12. That the Petitioner unprocedural took 6 days of sick leave from 2nd October 2014 without following due process and the Respondent only got to know when a stranger delivered a "sick sheet" on 6th October 2014 which "sick-Sheet" is not signed as required. Maximum support would have been given to the Petitioner had she informed the Respondent of her condition. By the time the Respondent learnt of the sick off granted to the Petitioner by her doctor, she had already been terminated. There was no advice that the 6 days rest was with regard to the petitioner's pregnancy. The doctor's visit was not an emergency and thus not a valid reason for the Petitioner to use for failing to inform the Respondent of her whereabouts from 2nd to 6th October 2014. There is a medical report dated 9th October 2014 which was not made available to the Respondent before they made the decision to terminate the petitioner. In any event it came after the termination.

13. That in any event the Petitioner was still under probation, she was not entitled to a hearing before termination, and the Respondent could only give 7 days' notice but opted to make payment for one month in lieu of such notice. The termination letter is proper as it was done in writing, and issued to the petitioner.

14. The practice of the Respondent is to share any termination notice with the management team in exclusion to other staff thus on 3rd October 2014, the Respondent did share the information with management staff and the access to such information was unauthorised. The fact that the Petitioner was aware of her impending termination she should not have proceeded on sick off and should have raised the issue with the Respondent if she felt aggrieved. This is outlined under paragraph 21 of the respondent's Replying Affidavit.

15. The petitioner's dismissal was lawful and justified under the provisions of section 42 of the Employment Act. The Petitioner is therefore not entitled to the prayers sought in her application. This should be dismissed with costs.

Analysis of the issues.

16. It is important to appreciate that for a long time in Kenya, employees have not had the necessary legal protection and a well laid down procedure that outline the unique circumstances of the labour relations until the enactment of the Employment Act, 2007 and the Labour Institutions Act with the former setting out the legal framework that is rights-based and the latter outlining key institutions that are to govern labour relations. These institutions include the Industrial Court as set out in the Industrial Court Act that give the Court a wide Jurisdiction to positively and proactively interpret various statutes vis-à-vis labour relations in Kenya. Of paramount importance is the place where protection of labour is situate under the Constitution, as a fundamental right and freedom under Article 41, which set out the labour regime and position the protection of fair labour practices under the Bill of Rights making fair labour relations a condition fundamental to freedom of every human being.

17. In this regard, this court in the case of Elizabeth Washeke and 62 Others versus Airtel (k) Limited, Cause No 1972 of 2012 held;

By having Article 41 of the Constitution, 2010 protecting labour relations/practices, it was a constitutional declaration with the purpose of ensuring that the legislative framework governing labour relations in Kenya was in accordance with the Bill of Rights. This sets the right to fair labour practices in the equity jurisdiction of the Industrial Court, in a changed constitutional dispensation.

Previously the legal regime operative for labour relations was bound with constraints especially for individuals who were not unionized and had no muscle to fight for fair labour practices. It is

not possible under the Employment Act, 2007.

18. The court therefore in appreciation that there is a changed employment and labour relations regime in Kenya, gave a detailed analysis as to the impact of constitutional provisions with regard to employers treatment of employees. The court has now built a wide jurisprudence with regard to the sanctity of the employment contract that should not only outline the terms and conditions of service for an employee but should also adhere to the tenets of the law. Where the constitution make mandatory provisions as under the Bill of Rights and the Employment Act goes further to translates these fundamental rights and freedoms and under the Bill of Rights into the labour regime, then employers are bound by such provisions even where there exists a contract of employment. Such a contract of employment must be read vis-s-vis the constitution and the applicable law and to read it as a separate documents simply because an employee has signed and continued to receive a salary as agreed would be to defeat the very essence of the changed constitutional and legal changes that have emerged since 2010 and 2007 with the enactment of a new constitution and new labour laws respectively.

18. Therefore in the **Elizabeth Washeke case**, the court went on to set out the framework of constitutional and legal rights as;

The Employment Act, 2007 has now created a framework for the regulation of labour relations in a changed political dispensation. Since 2007 the Industrial Court has used its equity jurisdiction to judicialise labour relations by setting out in its decisions in what acceptable labour practices are. These pronouncements effectively are revolutionising labour relations in Kenya, and have led to the fleshing out of the concept of the fair labour practices. Unfair labour practices have traversed the entire terrain of individual dismissal law and collective bargaining law.

By constitutionalising an entitlement to fair conduct is somewhat problematic as traditionally Bill of Rights were intended to regulate legislation and government power, not the conduct of employers.^[1] Indeed such a right as fair labour practice is unique to the Kenyan constitutional regime.

19. Therefore, court must read the constitution and the law purposively by giving life and meaning to the rights therein in a progressive and proactive manner. The context of each case is imperative. Without such breathing of life into existing rights, then the Bill of Rights and the law changes with regard to employment and labour relations in Kenya will lack a meaning.

20. In this case, the Petitioner is seeking various declaratory orders with regard to constitutional rights and legal protections that have been violated by the respondent. The basis of her claim is that she has been discriminated upon on the basis of her medical health and pregnancy status. The Respondent has purported to terminate her employment while on sick leave/off in utter disregard to her constitutional rights and applicable law.

21. The Respondent on their part challenge the petitioner's application on the grounds that the Petitioner was under a probationary contract that could be terminated upon 7 days' notice, they opted to pay for one months and using the law and the applicable policy, the summary dismissal was justified. That the Respondent only got to learn of the pregnancy of the Petitioner after the fact of the summary dismissal.

22. From the onset of the analysis herein, it is important to restate the constitutional provisions with regard to this matter, the applicable law that will help in determining the issues at hand. The constitution makes various declarations that private and public entities cannot go below. These are the values and principles as under article 10 of the constitution as;

10. (1) the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) Applies or interprets this Constitution;

(b) Enacts, applies or interprets any law; or

(c) Makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) Patriotism, national unity, sharing and devolution of power,

The rule of law, democracy and participation of the people;

(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

[Emphasis added].

23. Therefore, without distinction, both public and private persons are constitutionally bound by these principles and values without exception. The constitution is to be applied to all persons in the context that all persons have the inherent right to dignity, equity, social justice, non-discrimination and protection. Article 10 must be read together with other articles of the constitution and in this regard where discrimination against the Petitioner has been outlined;

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

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(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.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

24. By passing these constitutional provisions, the people of Kenya agreed that no persons shall be discriminated against, whether directly or indirectly on the outlined grounds, part of which is *pregnancy*. To give meaning to these declaratory rights and Bill of Rights, article 27 (6) require the state to enact legislation and take other measures designed to redress any disadvantage suffered by individuals due to discrimination against them. In this regard, I find the enactment of the Employment Act as a logical flow from these provisions. Section 5 of the Employment Act thus provides;

5. (1) *it shall be the duty of the Minister, labour officers and the Industrial*

Court—

a. *To promote equality of opportunity in employment in order to eliminate discrimination in employment; and*

b. *To promote and guarantee equality of opportunity for a person who, is a migrant worker or a*

member of the family of the migrant worker, lawfully within Kenya.

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(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;**

[Emphasis added]

25. These provisions are grounded on basic rights that the court is bound to enforce as they are the basis of the Bill of rights under the constitution. They form a firm basis of engagement at any level of a citizen's life, employment and labour relations inclusive. In that in circumstances where an employee is unwell for whatever reasons, within the employment and labour relations regime, the basic requirement on the part of an employee is set out under the Employment Act in that where one is sick or unwell, this is to be brought to the attention of the employer within *a reasonable time*. What therefore is a *reasonable practicable* is based on the circumstances of each case. This must start with the employer establishing a policy as under section 10(3) of the Employment Act as to what framework is to be followed by an employee who is unwell or sick.

26. In this case, a pregnancy in itself is not a sickness or illness but where there is a complicated pregnancy, chances of it being intertwined with illness and being sick is not far-fetched. What the employer should then examine is that where there is a complicated pregnancy, did the employee bring this to the attention of the employer within a *reasonable practicable*? These therefore become matters that can only be addressed in evidence as each case must speak for itself. In this case thus, the Employment Act separates what is maternity leave with sick leave and what is annual leave. The employer policy manual is also expected to see these as separate forms of leave that an employee is entitled to within the context that either can have impact on the other.

27. The law has therefore carefully couched provisions as to sick leave as follows as section 30 of the Employment Act;

30. (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

(2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

(3) For the purposes of sub-section (1) and (2) "full pay" includes wages at the basic rate excluding deductions from the wages allowable under section 19.

28. With regard to the application of sick leave, the yardstick is two months of service by an employee. Seven (7) days can be taken with full pay; the next 7 days can be taken with half pay. An employee who is sick and requires sick leave must produce a certificate of incapacity signed by a qualified medical practitioner or a person acting on the practitioner's behalf. Section 30(2) envisage an employee who becomes sick and is not able to apply as under section 30(1), such an employee shall cause the employer

to be notified as soon as reasonably practicable of their absence due to the sickness and the reasons for it.

29. Therefore section 30 contemplates where an employee may become sick and be unable to notify their employer immediately due to the nature of the sickness. Such an employee who finds themselves in such circumstances is expected to within a reasonably practicable period to *cause to be notified* their employer of their absence and the reasons for such absence. And this is to be supported by the incapacity certificate issued by a qualified medical practitioner. It is therefore reasonable to expect an employee who is sick, to send a fellow colleague, a source, a parent, a guardian or a friend to *cause to be notified* of their employer. Whether the circumstances that lead to the employee being absence are true, this can only be assessed through call of evidence. The employee who cites sickness as the reason of their absence cannot be taken *ab initio* as having absconded duty. This would be an unfair labour practice and any termination based on such a reason is a nullity whatever time such a decision is made before hearing the employee. See the decision in **Jane Wangari Njoroge versus EN Pertet t/a Joliday Nursery School, Cause No.1600 of 2011** where the court outlined the factors an employer must consider when addressing the case of an employee is sick and is absent from duty due to the same and is also pregnant.

30. In this case, the Petitioner stated in her affidavit that she travelled back from abroad on 1st October 2014 and on 2nd had an appointment with her doctor as she was having a complicated pregnancy. She was given 6 days sick off and caused to be notified of her employer by the 6th of October 2014. She has attached her certificate of incapacity. But this notwithstanding, the Respondent states that a decision to terminate the Petitioner had been made and shared with senior management as was the Respondent practice. The Petitioner was terminated on the basis that she was on probation and had not been confirmed as under the respondent's policy manual. They could therefore terminate her employment with or without any reasons her absence due to sickness notwithstanding as she had not been appraised and her contract was still in the probationary period.

31. Section 42 of the Employment Act provides;

42. (1) the provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

32. Section 42 therefore becomes one of the most outstanding provisions of the law and part of the new thinking in employment and labour relations in Kenya. That an employee under probation has to ensure good performance at all times as such an employee's employment can be terminated legally within this period without hearing, can be terminated within 7 days or less or be terminated immediately upon payment of 7 days wages. This is exceptional for the law to be couched in this manner.

33. Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period *shall not* be for more than 6 months *but it may be extended for a further period of not more than six months with the agreement of the employee.* As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and *may be extended with the agreement of the employee.*

34. Was the Petitioner still on probation at 7th October 2014 when the email with information of her termination issued? Reading section 42 of the Employment Act and noting that the Petitioner was employed by the Respondent as of 6th January 2014, by operation of the law, she became a full time employee as of 6th July 2014. Where there was extension of the probation period so as to add the applicable law and to cause her to remain as such, such are matters of evidence that the employer must present. otherwise, the applicable law, even in the context of the respondents own policy manual that require an appraisal system, if this is done outside the 6 months period, the operative law is set out as that the Petitioner upon her 6th month employment date, automatically, her work status changed. This is the law. This is what is expected in a fair and just work environment and part of the fair labour relations envisaged under article 41 of the Constitution. In **Maria Kagai Ligaga versus Coca Cola and Central Africa Limited, Cause No 511(N) of 2009**, the court held;

... This concept like many concepts in labour law is based on the recognition of the inequality of bargaining power in the employment relationship. If it did not exist, the danger would be that employers would simply force employees to quit, and avoid paying any form of compensation. The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under section 43 and 45 of the Employment Act the duty of showing that termination was fair is on the employer, in a case like this [of probationary period termination] ... other collateral issues that must be shown by the employee are: the employer made a fundamental change in the contract of employment, and that change was unilateral ...

35. In this case, the unilateral change of the probation period by the employer was contrary to the law. The resultant decision to terminate the contract of employment of this basis has no legal force. The termination became wrong and not enforceable under any written law. This cannot suffice as it is an illegality in the first instance.

36. The Petitioner has raised serious concerns with regard to the violation of her right to privacy. She stated that the employer shared about her termination with third parties before giving her this information. The respondent has justified this violation to privacy on the basis that it was their policy to share with top management any decision and the fact that the claimant accessed this information that was not within her position to access was wrong. That even where she accessed this information wrongly, then this should have served as a warning of her impending termination and should have not proceeded on sick leave. Herein lies very serious allegations on the right to privacy that cannot adequately be addressed in the interim. To do so at this stage would be pre-emptive of any evidence in this regard. I will state that much.

37. Looking at the orders sought, and the declaration seeking to restrain the Respondent from the *unfair, unlawful summary dismissal of the Petitioner pending the hearing and determination of this petition*, and based on the analysis above, this order will be granted in the interim pending call of evidence with regard to questions as set out above. Pending the hearing of the petition and noting the current circumstances of the Petitioner who has sworn an affidavit to the fact that she has a complicated pregnancy she is to remain in the Respondent employment. The orders herein are made with due regard to the provisions of section 46(h) of the Employment Act.

The court therefore makes the following orders:

- a. **The Respondent is hereby restrained from enforcing the summary dismissal against the Petitioner pending hearing and determination of the petition herein;**
- b. **The Petitioner shall resume her duties with the Respondent immediately without prejudice to the pending matter in court;**
- c. **The Petitioner shall receive medical support as a full time employee of the respondent;**
- d. **The Petitioner will continue to enjoy her current salary pending hearing and determination of the petition;**

e. **Due to the nature of interim Orders and petition, parties are to be given hearing dates on priority basis.**

Delivered, dated and signed in open Court at Nairobi this 18th day of November 2014.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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[\[1\]](#) See D Davis, H Cheadle & N Haysom (Eds) *Fundamental Rights in the Constitution* (1997) 208.