



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1248 OF 2012

ANN NJOROGÉ..... CLAIMANT

VERSUS

TOPEZ PETROLEUM LIMITED..... RESPONDENT

JUDGEMENT

This is a claim for wrongful termination of employment and failure to pay terminal benefits to the claimant Ann Njoroge. This claimant was filed on 23rd July 2012. The respondent Topez Petroleum Limited filed their response on 20th September 2012. In evidence, the claimant gave her sworn statement and the respondent called Francis Thuo Wanyiri, the managing director of the respondent. At the close of the hearing both parties filed their written submissions.

In the claim, the claimant states that on 21st April 2011 she was employed by the respondent as an office administrator, to commence on 2nd May 2011 with her duty station being the respondent head office in Nairobi. That on 21st February 2012 the claimant applied for maternity leave effective 5th March 2012 but was supposed to receive a notice dated 29th February 2012 indicating that she was transferred from Nairobi to Kisumu without an indication of the job details she was to undertake in the new station.

That on 5th March 2012, the claimant proceeded on her maternity leave of 60 days, and after this period, with the approval of the respondent she proceeded on her annual leave following her application dated 5th June 2012. That for no reason, the respondent unfairly terminated the claimant employment without notice withholding her salary and by withdrawing her from the respondent medical scheme.

That the basis of the claim is that the claimant was employed and stationed at the respondent head office in Nairobi but following her maternity leave application, she was transferred to Kisumu without being given her work details.

That following a medical recommendation dated 21st May 2012 given by the medical practitioner attending to her new baby; it was not possible to relocate to Kisumu since the baby required often medical check-ups

That despite the respondent being notified of the baby condition in a letter dated 29th May 2012 with a request to have the transfer reviewed, there was no feedback and on 5th June 2012, the claimant further appealed to the respondent but no response was given.

On 6th July 2012, the claimant sought guidance on her employment status from the respondent upon realising that her salary had not been remitted and that she had been withdrawn from the medical scheme

but no response was given.

The claimant further stated that the respondent was malicious in her transfer from Nairobi to Kisumu as the same was occasioned by her maternity condition. That her maternity condition resulted in her being discriminated against annual salary increment effected 1st April 2012, that the claimant was denied the 15% increase and further malice was due to withholding salary and medical scheme.

That the respondent wanted her out of employment by frustrating her as evidenced by her transfer on the eve of her maternity leave and further failure to adhere to medical practitioners advice that her baby required check-ups and that she was not given a hearing to address her case. That she was a good worker was never put into consideration, and when she appealed, she was not given a hearing.

The claim is for unpaid salary and allowances at kshs.16 866.00, 3 months' pay in lieu of notice at kshs.39,000.00, compensation for unfair termination at kshs.276,000.00 unpaid house allowance at kshs.44 850.00 and accumulated leave at kshs.1,548.00 all amounting to kshs.363,414.00 together with costs and interest.

In evidence the claimant stated that since 2nd May 2011 she was the respondent administrator, on 27th October 2011, her salary was reviewed from kshs.20, 000.00 to kshs.23, and 000.00 as an appreciation by the managing director of her good work. That immediately when she disclosed her pregnancy, the managing director changed and their conversations became strained and she was blamed for everything. On 5th March 2012 she took her maternity leave which was approved. She also got a notice of transfer to Kisumu from the head office in Nairobi. That she was to go to Kisumu as depot assistant effective 29th April 2012.

The claimant was delivered her baby on 13th March 2012 but the child needed medical attention. On 21st March 2012, she called the managing director about her child condition and asked that her transfer be reviewed to remain in Nairobi to help take care of the child. On 5th June 2012 she applied for annual leave to have more time with her child but there was no response. When she called she informed that it she did not report to Kisumu, and then she was sacked. She thus took it she had been terminated without notice. She was removed from the pay roll and staff medical scheme. She further stated that she did not refuse to work since she was not able to go to Kisumu due to the condition of her child. She appealed against the transfer but was not given a chance to be heard.

The claimant went on to note that she was not incompetent, she did her work well and her performance was not challenged. She was promoted due to her good work and the same was on merit as the respondent was happy with her work. That sick leave and maternity leave are rights due to an employee based on their employment. That she was discriminated against and the respondent was unfair when he transferred her to Kisumu noting the condition of her child. That this was inhuman due to the manner of termination as the managing director never asked or called to know how her child was doing. That this was insensitive and an irresponsible act to staff.

For the above reasons, the claimant outlined her claim to comprise notice pay, compensation, unpaid leave, costs and interest of the awards.

In cross-examination, the claimant confirmed that the respondent had provided a medical cover to all staff inclusive of herself and family and the new child. She used this medical cover to buy medicine. That during her pregnancy, her job was not affected and that the transfer came just before she commenced the maternity leave. That from her contract she could be transferred anywhere and that she did not refuse the transfer only that she was not able to go due to the condition of her child. That the child was born with a condition which the doctor required to be checked. That this condition was noted to be immunisation.

The claimant also confirmed that she has had other children when she was in Eldoret and that they were immunised from Eldoret. That in Kisumu there are facilities where a child can be immunised. But that her child had a condition that needed close medical observation. She wrote to the respondent to review the transfer but there was no response.

In response the respondent stated that the claimant transfer from Nairobi to Kisumu was as per commercial interests and rights of the respondent to management and enterprise stewardship which was lawful as the same was at their discretion, and the same was affected before the claimant went on her maternity leave. The claimant absconded duty leading to discontinuation of h3r salary and withdrawal from medical scheme.

The respondent further stated that the claimant was not discriminated against, she was to be terminated due to incompetence but was not and when she got her baby, the same was covered in the medical scheme. The respondent has offices in Nairobi, and depots in Nairobi industrial area, Nakuru, Eldoret, Kisumu, Mombasa and that in all these depots, they have one staff member except Eldoret and Kisumu. That Kisumu is one of the busiest locations.

The claimant was recruited upon recommendation by a fellow staff member Christine Otieno, she was never put through a competitive recruitment process to assess her competence or strength to deliver in her place of employment and since she was to be on probation for 9 months, her performance was to be reviewed and assessed periodically. That by June 2011 the claimant's competence was of concern to the respondent as in her typing and compiling of official documents and communication was wanting. This was discovered way before she reported her pregnancy and sought to have maternity leave and hence this was not a basis for termination.

The above notwithstanding, the respondent looked for an alternative placement but once the claimant got maternity leave and annual leave she absconded duty. When the claimant was reviewed for confirmation this was delayed to October 2011 and due to a series of noted incompetence, she was taken as a depot assistant with her consent. She was deployed to industrial area depot to get experienced and agreed that after her pregnancy she would be moved to Kisumu where that position was required. That the respondent worked on the transfer matter in consultation with the claimant.

When the claimant took her maternity leave, she later took her annual leave and later called at the office where she held discussions with the managing director requesting to have her leave waived but this was declined due to the nature of the respondent business operations, and Kisumu being the largest area of operation and that Nairobi did not have enough work to keep the claimant engaged especially at her designation. The claimant was last seen at the respondent offices on 5th June 2012, after her annual leave she never reported to her duty station was therefore not paid and was removed from the medical scheme.

That the claimant's case should be dismissed with costs to the respondent.

In evidence the respondent called Francis Wanyiri Thuo the managing director of the respondent who gave his sworn statement that he employed the claimant, he did not terminate her services, rather the claimant absconded duty without handing over their property in her possession and proceeded to file this case. The claimant was employed upon recommendation by another employee of the respondent, Christine who was taken to Eldoret. That the respondent has had other female employees who took maternity leave and resumed work without problems, they are a close team and interact well where on Fridays they go out for social time or month end get-together for staff. When the respondent got pregnant she was unwell and she got time to see a doctor.

The respondent has a medical cover for staff where the employee is the principal who can nominate dependants and the respondent is invoiced annually. Initially the respondent had sourced Britam and then changed to Reinsurance where the claimant was covered together with her child and after birth she nominated the baby under the cover.

At work the witness noticed that the claimant had challenges doing her job as an administrator, they held discussions every Monday where she took minutes but there were concerns from other employees as her sentences construction, grammar and other errors were an indication that she was not conversant, was not competent and this was reflected in official communications and mails to clients which was an embarrassment to the respondent. That these errors and acts of incompetence were reflecting badly on the respondent business.

The respondent had several depots in industrial area, Mombasa, Eldoret and Kisumu, the claimant was asked to go to the Nairobi depot due to her pregnancy and she agreed to move to Kisumu as the busiest station, and she was to become the depot assistant manager. To gain experience, she was to start at the Nairobi depot. The respondent had other female staff but none was treated differently due to pregnancy. All staff were deployed where there was most work. Hannah Ngige was taken to Eldoret as an accountant and later moved to Kisumu.

The witness further stated that the claimant came to the office after her maternity leave and presented a medical report on her child in need of outpatient treatment for immunisation and noting that the respondent medical cover was covering all staff in all their sites, the claimant would have been able to have her child treated or attended to even while in Kisumu. The respondent officer at Kisumu, Martin had a young family and they are all covered.

The respondent had expected the claimant to report to Kisumu after her maternity leave, but she took her annual leave despite the fact that she was not yet entitled as leave was due after one year service. On humanitarian grounds, she was given 15 days. She absconded and failed to return the property in her possession that belonged to the respondent.

Assessment

When an employee claim is based unfair termination that is countered with a defence of absconding, this court is thus invited to look at the circumstances of such a case more carefully as where an employee is proved to have absconded duty this is tantamount to gross misconduct and the sanction is summary dismissal without notice. This is as outlined under section 44 of the Employment Act and more particularly as under paragraphs 44(4) (a) as read together with (c);

(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

From the background of this case, the claimant stated that she was granted maternity leave and at the same time notice of transfer given to her. Thus, by the time she was proceeding on her maternity leave, she was aware that once she resumed duty, she was to proceed on transfer from one station to the next. However once her maternity leave was over, she applied to the respondent to have transfer reviewed on the basis that her baby had a condition that required constant medical checkups. There was a medical report from medical practitioners who wrote to the respondent;

TO WHOM IT MAY CONCERN

RE: REQUEST FOR THE MOTHER TO BABY WISDOM ANDREW MURUNGA TO STAY WITH HER BABY WITHIN NAIROBI

Baby Wisdom Andrew Murunga was born two months ago and by my recommendations still needs close paediatric services from his primary clinician.

Still requires frequent early infancy and childhood close follow up and immunisation which have already commenced.

Any assistance offered to facilitate this would be highly appreciated.

This letter was written on 21st May 2012. On 5th June 2012, the claimant applied for her annual leave before she resumed work after the maternity leave which even though not due was granted at 15 days. On this basis, her request for review of transfer was not granted.

To this the respondent noted that they had provided a medical cover for all employees inclusive of the claimant, the condition that the claimant's baby had was noted by the medical practitioner as that of '... *childhood close follow up and immunisation*' which was available to her in the new station as other respondent's employees with young families were also based in this station.

Following this request and lack of a positive response, the claimant did not report to the new station or return back to her old station. Her maternity leave was spent as well as her annual leave as applied. She did not report to her place of work.

I noted in the evidence of the claimant, she insisted that her baby had a 'condition' a 'condition' that made the baby require constant checkups and for this 'condition' the claimant had received a medical practitioner's letter to have the baby stay in Nairobi. Noting this was a two months old baby, the mother's care was definitely needed at this tender age. However, the claimant had been provided with a medical cover as required of the respondent and as noted by the claimant's medical record regarding her child, immunisation was required. I take note that immunisation is now a universally recognised practice and mostly in Kenya, there are facilities and major government drives for all families to access primary health care inclusive of immunisation of young babies and children at the nearest points. Kisumu is a large town with major hospitals where access to primary health care can be reasonably accessed. The fact that the respondent had other officers based in this town is evidence that a young child can reasonably be able to access health care and even immunisation at a public hospital or the private hospitals there where the respondent has under the medical cover.

Failure to report to work on the basis that an employer has failed to make changes that accommodate unreasonable demands of individual employees cannot find recourse in this court. The claimant, noting that her baby's doctor required immunisation, just like another young child would, should have reported to her new duty station. She failed to do so. This cannot be an act of discrimination against her or an unfair labour practice.

In conclusion, on the basis of this claim, I find the same to have been without any basis, the claimant filed this claim without due consideration of her failures and requirements as an employee and I hereby dismiss this claim.

I note the claimant acted in person, but was receiving legal advice from persons not present in court and persons she refused to disclose for the court assessment as to whether this was pro bono or paid for advice. In the circumstances of this case, the claimant will pay 50% costs of the respondent.

Delivered in open court this 30th day of July 2013.

M. Mbaru

Judge

In the presence of

Jacob Kipkirui: Court Clerk

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