



**REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT OF KENYA  
AT NAIROBI  
CAUSE 1354 OF 2011**

**JULIET W. NGUGI.....CLAIMANT**

**Vs**

**THE ADVERTISING CO. LTD.....RESPONDENT**

**JUDGMENT**

The Claimant Juliet Ngugi was employed by the Respondent The Advertising Company Ltd (TAC) on 22<sup>nd</sup> September 2010. She was dismissed on 23<sup>rd</sup> June 2011 having only worked for 9 months and a day. She was aggrieved by that dismissal and thus made this Claim. In the Claim, she has sought the following:

0. Three month's salary in lieu of Notice
1. Pay for unfair termination
2. Loss of expected earnings
3. Housing allowance
4. Certificate of Service.
5. Interest and Costs

The Claim was defended by the Respondent who denied she was entitled to the reliefs sought. Each party provided documentation and cited the Law in support of the rival contentions.

Before the hearing of the case, the Respondent issued the Claimant with a Certificate of Service and thus that part of the Claim is for all intents and purposes abandoned.

One issue stems from the Respondent's Reply to Memorandum of Claim which must be determined right at the outset. There is an assertion that the Claimant lacks *locus standi*. This Court has been established pursuant to Article 162(2) of the Constitution to hear and determine disputes relating to employment and labour relations *inter alia*. The plethora of rights available to litigants before this Court was considered in a decision given by the Hon. Mr. Justice Majanja being Petition No. 356 and 359 of 2012 reported online as *United States International University (USIU) v Attorney General [2012] eKLR* on the 22nd August 2012. I concur with my learned brother Judge.

The Court is established pursuant to Article 162 of the Constitution of Kenya 2010.

Article 162(2) and 162(3) provide as follows:-

**162(2)** Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Parliament passed legislation in 2011 being the Industrial Court Act, Act No. 20 of 2011, to bring to effect the provisions of the Constitution under Article 162(2).

The Industrial Court Act 2011 Section 4 provides as follows:-

Section 4.(1) In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

(2) The Court shall be a superior court of record with the status of the High Court;

(3) The Court shall have and exercise jurisdiction throughout Kenya.

The relevant sections of Section 12 of the Industrial Court Act, 2011 sets out the jurisdiction of the Industrial Court as follows:

12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

.....

Nothing in Section 12 above fetters this Court from hearing the Claimant. Additionally, Section 4 (*supra*) confirms that this Court is a Superior Court of record with status of the High Court. The predecessor of this Court was a Tribunal established pursuant to the Labour Institutions Act Part III and in particular Sections 11 to 27 which were repealed by the Industrial Court Act No. 20 of 2011.

The above tries in short to answer whether this is the appropriate forum to hear the dispute.

As regards standing proper, the Claimant has standing. She was in employment with the Respondent and a dispute has arisen relating to the employment. In addition Section 45(3) of the Employment Act 2007 which the Respondent relies on, was declared unconstitutional by the Hon. Justice Lenaola in **Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011**. I concur with my learned brother Judge. There is absolutely no magic in the period of 13 months. The rights granted under Article 43 of the Constitution are not amenable to abridgement by the Employment Act 2007. As stated by the learned Judge at pages 12 and 13 of the decision:

Reading the two Sections together with Articles 27 and 48 of the Constitution, there is obvious discrimination and the Applicant and those in his situation have been denied equal protection and equal benefit of the Law and they have also been denied “the full and equal employment of all rights and fundamental freedoms” to the extent expected by the Constitution. They have also been denied “access to justice.”

I have held as above because I am in agreement with the Petitioner that there is no explanation offered by either the 2nd Respondent and the Attorney General why a person who has worked for one (1) year and one (1) month is the only one who can claim that his employment has been unfairly terminated and that one who has worked for less than that period cannot have the benefit of that claim. I have attempted on

my own and without assistance from counsel to get the justification for such a provision but my efforts have come to naught. I have elsewhere above reproduced Section 36 of the South African Act and it is easy to see that a person who works for less than 24 hours a month may genuinely have no claim for unfair termination but how can one explain that a person who has worked for a full year and more can be unfairly terminated and have no recourse to the protection of the

Law? Why discriminate in such a blatant manner and why close the doors of justice to an otherwise deserving litigant on account of period served which is not legitimately too short to have any lawful meaning?

That in short torpedoes the argument by the Respondent regarding the Claimant's claim coming as it did from a person who was in employ for 9 months.

Now to the issues for determination in the matter. The issues this Court has to determine can be gleaned from the Pleadings to be the following:

1. Was the dismissal of the Claimant unfair?
2. Is the Claimant entitled to payment for the unfair termination?
3. Does a claim for loss of expected earnings lie? And if so, how much is due under this head?
4. Is the Claimant entitled to Housing (sic) allowance?
5. Costs and Interest – are these due?

The last issue depends on the success or failure of the Claim and will therefore not form part of the main analysis in the case.

### **1. Was the dismissal of the Claimant unfair?**

The Claimant was employed as a Personal Assistant/Office Administrator of the Respondent. Her salary was Ksh. 60,000/- gross per month. The letter contained various illegal provisions whose import will emerge in this judgment. It is not disputed that the Claimant worked until sometime in June 2011 when she was absent from work culminating in the dismissal on 23<sup>rd</sup> June 2011.

It seems the Respondent did not confirm the Claimant to her position over 9 months later. This is not right. The letter of Appointment stated that the appointment was subject to a probationary period of 3 months. Nothing remotely suggested that the Probation period could be extended leave alone deferred for 9 months! It is one of the hallmarks of a good employer to act within the provisions of the appointment letter and the law.

What led to the termination? The Claimant has stated that she was unwell due to complications arising from a pregnancy. The evidence before Court shows that she lost her child on 14<sup>th</sup> June 2011 after her admission. She underwent an emergency Caesarian Section but the girl did not live beyond 3 days. The Certificate of Birth did not bear her name. It is upon the return to work that she was handed her termination letter dated 23<sup>rd</sup> June 2011.

The termination letter was adduced as evidence. It read as follows:

*23<sup>rd</sup> June 2011*

*Juliet W. Ngugi  
P.O Box 79395  
Nairobi*

*Dear Juliet*

*Further to our letter of 22<sup>nd</sup> September 2010, we wish to inform you that we will not be confirming you in the position of PA/Office Administrator.*

*Please find enclosed cheque number 000048 for your salary for the month of June 2011.*

*We thank you for the services rendered and wish you well in the future.*

*Sincerely,*

*Paul Owora  
C.E.O*

The letter is by all standards an indictment on the Respondent. No reason for the termination was tendered, no evidence emerges on misconduct by the employee to warrant the dismissal.

The fact that the Claimant was in hospital with a serious complication arising from the pregnancy is not controverted by the Respondent. I would have expected the Respondent to have known better. The employer must have staff such as the CEO who interacted with the Claimant. It is not possible that the Claimant who had been pregnant all along could have kept this away from the eyes of all concerned. Since she had been pregnant for a substantial portion of her employment and suddenly went 'missing' it was obvious there could have been complications due to her condition. The Respondent merely states in the Reply to Memorandum of Claim that the Claimant absconded from duty. There is no indication of any steps taken to ascertain her whereabouts. It would be preposterous and an elevation to a fetish to require the prompt attendance of the Claimant to work as opposed to getting medical care.

This Court finds that the termination was unlawful and inhuman to say the least. Damages would of necessity lie for the termination.

## **2. Is the Claimant entitled to payment for the unfair termination?**

The natural consequence of the finding in Issue 1 above is that the Claimant is entitled to payment for the unfair unemployment. What amount is fit?

At the onset, let me state that contracts of employment can be terminated. Employment contracts may be lawfully terminated by the employer (subject to due attention to the human rights of the staff concerned) for stated reasons provided that reasonable notice of termination is given. The period of notice will be that expressly agreed to by the employer and employee. The primary purpose of reasonable notice is to give the employee an opportunity and a reasonable period of time to search for alternate employment. In the absence of an express agreement as to notice between an employer and employee, the reasonable notice to which an employee is entitled varies depending on the circumstances of the case but some consideration would be placed on the following factors:

- character of employment;
- length of service;
- age of employee;
- salary;
- availability of equivalent alternative employment; and
- any other relevant factor such as the economy, profession etc.

It would seem the Respondent did not give any notice ostensibly because there was no confirmation in employment. When considered against the backdrop of the foregoing, the rights of the Claimant were abridged to a certain extent. One month's notice would not suffice due to the caprice of the Respondent. It would be reasonable to Order payment of 3 months salary in lieu of notice. For avoidance of doubt, each employee of any given company is entitled to leave as well as sick leave. The minimum period of leave is 21 days as per the Employment Act. See Section 28 below:

28. (1) An employee shall be entitled—

(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave

with full pay;

The argument put forth by the Respondent about the Claimant not being entitled to leave because she had not served for one full year does not wash.

### **3. Does a claim for loss of expected earnings lie? How much is due under this head?**

Expected earnings lie in the realm of special damages which must be pleaded and proved.

In order to understand this portion of the Claim it is critical that I analyse what lost or future earnings are. The Claimant's expected income is what could be used to compute the same. It could be the current income as against the actual income in future. For past losses which occurred prior to trial, this calculation is usually based on the assumption that the Claimant's earnings would have been in equilibrium. The Claimant's expected income is assumed to include cost-of-living adjustments and scheduled promotions and salary increases but does not include factors such as upward mobility to a more lucrative engagement.

Future earning capacity is what the Claimant might have earned had the intervening circumstance not occurred. The damages payable would be her earning capacity minus projected earnings. However, there could be a situation where a Claimant is well along in life in a dead-end job in which case her future earning capacity may simply equal present income plus cost-of-living adjustments as a result of inflation and other attendant factors. Future financial earnings are not certain and therefore this is an area that would require a foray into the quantum of loss on a similar footing as that in the famous treatise **Kemp & Kemp: Quantum of Damages**. In this case, the Claimant has not made a fit case for losses alleged to have occurred under this head. There is no guarantee that she would have worked with the Respondent until 60 years of age. The job was not in the category of permanent and pensionable jobs. She therefore is on a plank here and will not recover under this head. Applying the multiplier effect to this case would be stretching the bounds of damages either exemplary or general as regards employment. In injury claims under employment law certainly there would be a case for damages under this head if proved but not here.

### **4. Is the Claimant entitled to Housing allowance?**

Section 10 of the Employment Act 2007 provides *inter alia*

Section 10(2)(h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

This position does not obtain in the letter of appointment which is the Contract of employment in this case. The letter woefully falls short of the bare minimum set under the Industrial Court Act **Part III – Employment Relationship**. This Court would wish to point out this part so that the Respondent can familiarize itself with the Law as obtains presently.

The payslip produced as Annexure 2 sets out the items it covers which are – Basic Pay 60,000/-. The deductions indicated are taxes and contribution as set out - PAYE 11,872/- NSSF 200/- and NHIF 320/-.

The net pay is indicated as 47,608/-. Nowhere is it stated that the Gross pay is inclusive of House allowance.

The Constitution of Kenya makes provision under Article 43 for certain rights.

43. (1) Every person has the right—

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- (b) to accessible and adequate housing, and to reasonable standards of sanitation;
- (c) to be free from hunger, and to have adequate food of acceptable quality;
- (d) to clean and safe water in adequate quantities;
- (e) to social security; and
- (f) to education.

The Court is minded of the provisions of Section 31 of the Employment Act 2007. The Section provides as follows:

(31).(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

In the letter of appointment as well as the Pay slip there is no suggestion however remote, that the housing as envisaged in law and emboldened by the Constitution was provided to the Claimant. This Court finds that the Claimant was entitled to house allowance in lieu of housing and the answer to the Issue No. 4 is yes. What is the quantum due? The position she held would have attracted a house allowance of Kshs. 25,000/- per month. She worked for 9 months and was entitled to a month's notice making the total 10 months. For this head she is entitled to:

**10 x 25,000/- = 250,000/-**

#### **5. Costs and Interest – are these due?**

The Claimant has succeeded in the main and costs will follow the event. Is interest due? The Respondent has callously retained the dues to the Claimant and other than mulcting the Respondent in costs, it is fit to order that the Respondent bears an additional cost – interest which the Claimant has claimed. Interest can be either at commercial rates or court rates. The circumstances obtaining in this case have not revealed a more punitive rate is applicable. The order that commends itself to make is one for costs and interest at court rates in favour of the Claimant.

In the final result I do hereby order the following:

- 0. Kshs. 180,000/- as Notice pay
- 1. Kshs. 250,000/- as unpaid house allowance
- 2. Interest and costs.

It is so ordered.

**Dated and Delivered** at Nairobi this **24** day of **September** 2012

**Nzioki Wa Makau**  
**JUDGE**