



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1600 of 2011

JANE WANGARI NJOROGECLAIMANT

VERSUS

E.N. PERTET T/A JOLIDAY NURSARY SCHOOL.....RESPONDENT

JUDGEMENT

This is a claim dated 19th September 2011 filed by Jane Wangari Njoroge claiming unlawful termination of employment. The respondent filed their response dated 14th October 2011 citing that the claimant absconded from duty and therefore the termination was not wrongful.

On 27th June 2012 the matter initially commenced exparte in the absence of a defence by the respondent and an award was to be made by Justice Koskei. The respondent filed a Notice of Motion dated 3rd July 2012 seeking to stay the making of the Award pending the hearing of the application on the grounds that the exparte proceedings on 27th June 2012 should be set aside to allow the respondent submit their defences.

On 24th September when the Notice of Motion came up for hearing the parties herein agreed to the application and the Court set the main suit for hearing on 24th September 2012.

It was the evidence of the claimant that she was employed by the respondent as a nursery school teacher in 1990 until April 2010 when she was wrongfully terminated. That her last monthly salary was kshs. 14,840.00.

That in April 2010 the respondent terminated her services while she was on maternity leave and refused to allow her to resume work. She was told that she was too old to work. That because of her pregnancy, the claimant had applied for maternity leave in January as the baby was due in February. That the application letter was received by management. However, claimant was recalled to work whereupon she was given a termination letter which she refused to sign as the cheque amount attached for terminal dues were not adequate according to her assessment and the letter had indicated that once signed she could not claim anything else from the employer. The cheque was for payment for January and February salary without any benefits. She however wrote a complaint to management.

The respondent gave feedback on 24th May 2010 and claimant proceeded to Kituo cha Sheria where a letter of demand was issued to the respondent. That the respondent had expected her to take leave in

January 2010 and resume in March 2010.

She now claims for 4 months salary not paid being January to April 2010, notice pay for one month, NSSF dues and other dues forfeited due to the dismissal up to the age of 60 years together with leave over the same period.

In response to the claim the respondent averred that indeed the claimant applied for maternity leave effective end of January 2010 which leave was granted but the same was taken at the beginning of January unilaterally without advising the respondent. That the maternity leave granted by the respondent was to lapse in March 2010 with the claimant required to resume work at the start of April but did not do so until 20th April 2010.

The respondent further asserted that it was the claimant who was in breach of the terms of her employment by being in habitual neglect of her duties, insolence and lack of respect for her employers, breaching the code of conduct and being indisCIPLINED.

In cross-examination the claimant gave evidence that she reported back on duty on 20th April 2010 where she was issued with a letter of termination and a cheque for an amount covering her salary for February and March 2010. This she disputed and a quarrel ensued whereupon she declined to accept the letter and the payment. That the claimant was aware of the Sacco loan outstanding unpaid but she had already organised with the chairman and her guarantor on how to offset this balance. That this should not have been used by the employer to deny her terminal dues.

Court notes that under Section 29 of the Employment Act, all female employees are entitled to three months of maternity leave with full pay and annual leave is not forfeited on account of an employee having taken her maternity leave.

On expiry of a female employee's maternity leave ... the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.

However for an employee to enjoy such leave she must give not less than seven days notice in advance or a shorter period as may be reasonable in the circumstances of her intention to proceed on maternity leave on a specific date and to return to work thereafter. This notice must be in writing and if the employer so requests produce a certificate of her medical condition from a qualified medical practitioner or midwife.

An employee who enjoys maternity leave shall not forfeit her annual leave. This is a legal entitlement.

It is not in dispute here that the claimant applied for maternity leave which was granted by the respondent. The dispute is that the claimant asserts that her leave was to commence at the end of January and end on 20th April 2010 since she was expecting her child in February whereas the respondent contends that the leave granted was to commence in early January and end in March. However no party has submitted this leave application form in support of this assertion. Court takes it that the claimant lodged this application with the employer who approved and retained the document of approval which is not in dispute as having been granted.

Court notes that the claimant is very clear on the fact that she was to resume duty on 20th of April which she did under the assumption that her leave commenced on a date calculated back to January to allow for the 3 months period. It is important to also note that the granting of this maternity leave notwithstanding, the claimant was also entitled to her annual leave.

Since the respondent disputes the time approved for the maternity leave, and later used this reason to terminate the claimant's employment, the duty rests with respondent to give evidence that indeed this leave commenced on a different date other than the time when the claimant actually took leave. The

allegation that claimant absconded from duty is not supported by any evidence. No letter written to the claimant or a warning was produced. This is a legal requirement that for the avoidance of doubt, all warnings must be in writing, and where they are verbal, a witness must be called to confirm. Noting the serious implications of termination of one's employment, these are details that any employer should take very seriously. In the absence of such evidence court finds the claimant's assertion as the correct position.

This clarity is enshrined under section 43(2) of the Employment Act thus;

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

An unfair termination is thus outlined as that termination that has not valid reasons, did not follow fair procedure that in the circumstance the employer did not act in accordance with justice and equity in terminating the employment of the employee.

In the case of the claimant, she gave evidence that she has served the respondent for over 20 years and when she reported back she was told that she is too old to work. The non-payment of her salary while on maternity leave directly infers that the respondent had already decided that she was going to terminate her services despite having approved her maternity leave.

Court having established that the Claimant was lawfully entitled to her maternity leave and the same commenced at the end of January, she was therefore entitled to her salary for the duration of the maternity leave running up and until 20th April 2010.

The haste with which the respondent issued a cheque for final payments and a letter indicating that the claimant was to receive her payment for February and March salary without any further claim in termination is an indication that the respondent no longer desired to keep the claimant in their employment. Whether there was a balance due to the staff welfare association is immaterial here as these welfare arrangements are supposed to run separately and independent of management interference. Whatever loan balances owed and due were the responsibility of the claimant to clear with her welfare association.

Therefore court finds that the procedure adopted by employer in reaching decision to dismiss the employee was unfair and the manner of communication of the decision was not as prescribed under Section 35 of the Employment Act or any other written law. The claimant was never given a chance to appeal this decision nor was she notified of the grounds in written even for the alleged absconding. Court observes that for an employee who has served continuously and without any record of indiscipline for 20 years, the conduct and capability of employer in the handling of the termination was overzealous and meant to avoid payment of terminal dues owed to the claimant.

There was no valid reason for termination relating to the claimant's conduct, capacity, and incapability or connected with the procedural requirement of the employer. The procedure for termination set out under Section 41 of the Act was also not followed. She was not granted any hearing.

There is no indication that the Respondent has failed to submit dues to statutory bodies especially to the NSSF and Court will not grant this prayer. A Certificate of Service is a legal right for all employees at the end of every employment. In the circumstances I am persuaded that the claimant is entitled to the clauses set out in the claim and she is entitled to salary due in January, February, March and April 2010 as she was on paid leave. She is entitled to one month salary in lieu of notice⁴. She is also entitled to damages for unlawful loss of employment. I find six months' salary compensation reasonable in the circumstances. For the above reasons the court enters judgement for the claimant as follows:

a) That the claimant suffered unlawful loss of employment

b) The respondent is directed to pay the claimant the following final dues

- 1. One month salary in lieu of notice at kshs. 14,480.00**
- 2. Salary for January, February, March and April 2011 amounting to Kshs. 55,256.00**
- 3. Six months salary as compensation for unlawful loss of employment amounting to Kshs. 86,880.00**

Total Kshs. 156,616.00

c) That the claimant be given a Certificate of Service

d) Costs of the suit granted to the claimant.

e)

Dated and delivered at Nairobi this 12th day of October 2012.

M. W. Mbaru

JUDGE

INDUSTRIAL COURT OF KENYA

In the presence of:

Court clerk.....

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