



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 264 OF 2016

BETWEEN

ELIZABETH MWENDE TIMOTHY.....CLAIMANT

VERSUS

BRINKS SECURITY SERVICES LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

J.N Matara & Company Advocates for the Claimant

M.M.Kimuli & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 29th March 2016. She states she was employed by the Respondent Private Security Company as a Security Guard, between 15th October 2011 and 5th February 2015. Her last salary was paid at a rate of Kshs. 9,500 monthly.
2. She avers she applied to go on maternity leave from 1st November 2014. The Respondent denied her maternity leave, but allowed her 1 month of annual leave, beginning 1st November 2014, to end 1st December 2014.
3. She delivered on 1st December 2014 through C-section, after an extremely difficult and protracted labour. She was admitted at the hospital from 30th November 2014 to 3rd December 2014. After discharge she stayed at home recuperating from the operation.
4. She returned to work on 5th February 2015. She was summarily dismissed. She was not paid anything by way of terminal dues. She prays the Court to find dismissal was unfair, and grant Judgment to her against the Respondent, in the following terms:-
 - a) 1 month salary in lieu of notice at Kshs. 9,500.
 - b) Accrued annual leave of 1 year at Kshs. 9,500.
 - c) Overtime for 3 years worked at Kshs. 42,749.
 - d) Compensation for unlawful termination equivalent of 12 months' salary at Kshs. 114,000.
 - e) Unpaid salary while on maternity leave at Kshs. 28,500.
 - f) Public holidays for 3 years worked at Kshs. 24,115.
 - g) Gratuity at Kshs. 14,250.

TotalKshs. 242,614

h) Certificate of Service to issue.

i) Costs and Interest.

j) Any other relief the Court may deem fit to grant.

5. The Respondent filed its Statement of Response on 22nd February 2017. It is conceded that the Claimant was employed by the Respondent, on a monthly salary of Kshs. 9,500. The Respondent denies that it unfairly dismissed the Claimant, through pregnancy-related discrimination. She never applied for maternity leave. She applied for annual leave. She signed the Leave Application Form. She was to report back on 1st December 2014. She failed to report back after her annual leave expired. She did not communicate with the Respondent, giving any reason for her failure to return to work. She did not report back on 5th February 2015 as alleged. She was not dismissed by the Respondent. She left and failed to return. She is not entitled to any of the prayers. The Respondent states if any prayer is made in favour of the Claimant, this should be less 1 month salary in lieu of notice due to the Respondent, and the value of unreturned property at Kshs. 8,884.

6. The Claimant initially gave evidence in the absence of the Respondent, and closed her case, on 14th December 2016. Ex-parte proceedings were vacated through an order of the Court dated 10th February 2017. The Claimant was heard afresh in the presence of both Advocates, and closed her case, on 19th March 2018. The Respondent's Branch Manager Mombasa, Benard Kyengo Kawea, gave evidence for the Respondent on 12th June 2018 when hearing closed. Parties confirmed the filing of their Closing Submission on 18th September 2018.

7. The Claimant restated in her oral evidence, her employment history with the Respondent, and her terms and conditions of employment, as contained in her Pleadings.

8. She applied through a letter dated 17th October 2014, to go on maternity leave beginning 1st November 2014 [Claimant's exhibit 2].

9. She was advised by the Manager Benard Kyengo, that the Respondent does not allow Employees to go on maternity leave.

10. Kyengo instead issued the Claimant Annual Leave Application Form. She was asked to apply for annual leave of 30 days, beginning 1st November 2014, ending 30th November 2014. She did so and signed the Form under compulsion. She was to report back to work on 1st December 2014.

11. She delivered through C-section on 1st December 2014, when scheduled to return to work. She was under treatment the whole of December 2014. She informed the Respondent about this.

12. She returned to work on 5th February 2015. She was advised there was no more work. She asked for a letter of termination. She was given back her School Certificates, but no letter of termination. Kyengo dismissed her through word of mouth. She was not paid terminal dues. She worked for 3 years. She did not go on annual leave in 2012. She was not paid her salary during maternity leave. She worked all Public Holidays. The Respondent paid her N.S.S.F contributions. It is not true that the Claimant opted to apply for annual, rather than maternity leave. She returned her uniform to the Respondent on 2nd November 2014. She did not abscond as alleged by the Respondent.

14. On cross-examination, she told the Court that she delivered on 1st December 2014. She did not avail to the Court, Certificate or Notification of Birth. She applied for maternity leave on 17th October 2014. It is not true that the Respondent did not receive the letter applying for maternity leave. The letter is not stamped by the Respondent.

15. The Leave Application Form has various types of leave- annual, compassionate, maternity etc. It was taken to the Claimant by the Respondent, already filled. She did not fill the Form, after absconding. She did not abscond. She left work on 1st November 2014, and returned on 5th February 2015. She could not return before because she was unwell. The Leave Form is indicated to have been signed on 18th November 2014. The Claimant was not at work at the time. She did not write to the Respondent to say she was unwell. She communicated this to the Respondent through her phone. The Respondent answered to the Claimant rudely. Redirected, she testified that she made her application for maternity leave to Kyengo. He refused to acknowledge receipt, saying that the Respondent does not normally provide for maternity leave. She did not read the Leave Form. Her exhibit 4, which is a discharge summary from Coast Province General Hospital, shows she delivered and was treated at the Hospital as stated in her evidence.

16. Benard Kyengo Kawea confirmed the Claimant was employed by the Respondent, on the date, terms and conditions of employment pleaded by the Claimant. She was scheduled for annual leave in November 2014. She proceeded on annual leave. She did not disclose to the Respondent that she was pregnant. Kyengo did not notice her pregnancy. She left on 1st November 2014, to return on 1st December 2014. She did not return. She did not contact the Respondent. The Respondent did not hear from the Claimant until she filed this Claim. The Respondent does not dismiss its Employees verbally; it follows formal procedures. Maternity leave is available to Employees upon application. The Claimant would have been issued maternity leave if she applied.

17. Cross-examined, Kyengo told the Court he did not see Claimant's letter applying for maternity leave. He saw the letter for the first time in Court. He would have recommended to the Respondent that the Claimant is availed maternity leave, if he had seen her application. Kyengo's Assistant, Gabriel, filled the Claimant's Leave Form. Leave commenced on 1st November 2014. Kyengo was not able to say why the Form indicates that the Claimant signed on 18th November 2014. He did not notice that she was pregnant. He did not recall if she went back to work in February 2015. He did not recall if she was dismissed unfairly. The Respondent generated a document dated 22nd November

2016, titled 'Final Dues.' If the Claimant returns Respondent's Uniform, she would receive her Certificate of Service. She was not sidelined for being pregnant. Redirected, Kyengo told the Court that the Respondent paid Employees through the Bank. There were no Bank Statements showing that the Claimant did not receive her November-December 2014 salary. Leave Form is filled by different People. They do not sit in a conference and sign. This explains why the signing dates are different.

The Court Finds:-

18. There is no dispute that the Claimant was employed by the Respondent as a Security Guard on 15th October 2011. Her monthly salary at Kshs. 9,500 is not disputed.

19. It is disputed that her contract was terminated by the Respondent. She alleges she applied for maternity leave effective from 1st November 2014. She was told by Kyengo that the Respondent does not entertain applications for maternity leave. She was directed to instead apply for annual leave of 30 days effective 1st November 2014, to 1st December 2014. She was brought a Form already prepared, which she was compelled to sign. The Respondent denies it was aware about the Claimant's pregnancy. Kyengo did not notice the Claimant was pregnant. She did not submit her application for maternity leave. She instead opted freely to take annual leave. The Respondent would have allowed her maternity leave if she had submitted her application.

20. The Claimant gave birth on 1st December 2014, the date she was supposed to return to work, going by the disputed Leave Application Form.

21. There is medical evidence that she delivered at Coast Provincial General Hospital. It cannot be disputed that she was expectant and delivered as shown in the discharge summaries from the Coast Provincial General Hospital.

22. The Court has seen her handwritten letter dated 17th October 2014, applying to take maternity leave from 1st November 2014. The letter is addressed to the Manager, Brinks Security.

23. The Manager, Brinks Security, was not a truthful Witness. The Court does not believe him when he says he did not receive the Claimant's letter, and did not observe that she was expectant. Other false statements recorded by the Court from Kyengo, are that he did not recall if the Claimant returned to work in February 2015, and that he did not recall if he dismissed her through word of mouth. Why would these recollections escape Kyengo? Kyengo struck the Court as being a substandard Witness, whose evidence cannot be relied upon.

24. The Claimant on the other hand offered qualitative and consistent oral evidence, supported by documents which are self-explanatory. She was expectant and applied as early as 17th October 2014 to go on maternity leave beginning 1st November 2014; she was instructed by the Respondent instead, to take a month of annual leave beginning 1st November 2014; she signed a Leave Form prepared by the Respondent, and left on 1st November 2014; a month later she delivered through C-section on the date her imposed annual leave expired, 1st December 2014; she was on treatment and recuperation in the months of December 2014 and January 2015; she went back to work on 5th February 2015; and the Respondent shut her out, informing her through Kyengo, that she had been dismissed for alleged abandonment of duty. This evidence is consistent, qualitative and believable.

25. Section 29 of the Employment Act 2007 entitles a Female Employee to 3 months of maternity leave, with full pay. The Claimant was entitled to 3 months of maternity leave effective 1st November 2014. Taking into consideration the Public Holidays in between 1st November 2014 and 5th February 2015, it does not look unreasonable for the Claimant to return on 5th February 2015. Her 90 days of maternity leave lapsed at or about the date she returned.

26. The first statutory breach occasioned to the Claimant by the Respondent, was that she was denied the right of taking her maternity leave under Section 29 of the Employment Act. The Respondent instead compelled her to take annual leave, which expired on her labour ward bed.

27. The second breach is that she was not paid her salary for the period between November 2014 and February 2015. It was not for the Claimant to bring to this Court her Bank Statements to show non-payment; it was for the Respondent to bring employment records to prove payment. An Employee was denied her monthly salary at a time she needed it most- when welcoming a newborn.

28. The third breach, under maternity leave law, is that the Claimant was denied her right to return to work, upon expiry of maternity leave. Section 29[2] states that the Female Employee shall have the right to return to the job she held immediately prior to her maternity leave, or reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave. She was dismissed when she returned. Dismissal was by word of mouth. Kyengo did not even record termination of employment anywhere by issuing a letter of summary dismissal. The Respondent took the position that it could not recall, if the Claimant returned in February, or if she was dismissed by word of mouth. The bottom line is that the Claimant suffered a third breach- denial to resume her guarding duties under Section 29 [2] of the Employment Act.

29. Fourth, the decision to summarily dismiss the Claimant did not conform to the standards of fairness, laid down in Sections 41, 43 and 45 of the Employment Act 2007. There were no valid reasons to justify dismissal and no form of hearing was held. The Claimant was merely told by word of mouth that she had been summarily dismissed. Even assuming she absconded, and was away without lawful cause, or leave from the Respondent, she was not granted an opportunity to explain her absence through a disciplinary hearing.

30. Lastly, the Claimant was denied her right not to be discriminated against on the ground of her pregnancy, under Section 5[3] of the Employment Act 2007 and Article 27[5] of the Constitution of Kenya. The Claimant told the Court that she was told by Kyengo, and the Court believes her, that the Respondent does not entertain applications for maternity leave. She was compelled to sign Leave Form, committing her to report back to work on the date she delivered. She would not have signed such a Form voluntarily, knowing she was due

for delivery on 1st December 2014, the date she was expected to return to work.

31. Section 5[1] [a] of the Employment Act binds the Court to promote equality of opportunity in employment in order to eliminate discrimination in employment. Article 20 of the Constitution makes it a fundamental duty of the Court to observe, protect, respect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

32. Rule 3 of the Employment and Labour Relations Court Rules, allows the Court to enforce constitutional rights and freedoms through a Statement of Claim, or other Suit.

33. Pregnancy discrimination as stated in ***G.M.V v Bank of Africa Limited [2013] e-KLR*** is not redressed adequately through the statutory ceiling of 12 months' salary set under the Employment Act. This form of discrimination offends individual as well as societal values, such as: the inherent dignity of the human person; equality of persons; the right to work and earn equal remuneration; freedom from discrimination; the right to have a family which is a basic unit of the society; and the right to fair labour practices. What is to be redressed is not a simple Claim for unfair termination; to be redressed is a Claim which involves grave violations under statute, and under the organic law. The remedy of compensation for unfair termination is confined to redressing the Claimant for economic loss resulting from loss of employment. It redresses an economic injury. To adequately remedy claims of pregnancy-related discrimination, the Court must resort to the remedial jurisdiction given to the Court under Section 12(3)(v)(vi), of the Employment and Labour Relations Court Act, and Article 23(3) of the Constitution of Kenya.

34. ***The Claimant is granted 1 month salary in lieu of notice at Kshs. 9,500.***

35. ***She is granted equivalent of 12 months' salary in compensation for unfair termination at Kshs. 114,000.***

36. ***She is allowed the prayer for arrears of salary for the period of maternity- November, December 2014 and January 2015, at Kshs. 28,500.***

37. She has not established her prayers for overtime, accrued annual leave, public holidays and gratuity. These prayers are rejected.

38. Under her prayer for any other award, damages for pregnancy discrimination must be considered. The Claimant of course, ought to have pleaded pregnancy discrimination in a forthright manner. The Court has explained that pregnancy discrimination touches on much more than simple breach of the contract of employment and breach of statutory provisions. It implicates constitutional rights, and should be pleaded, and considered separate from the prayer for compensation for unfair termination. The Claimant is not to be denied a remedy for pregnancy discrimination based on her failure to plead this remedy directly. She has asked the Court to consider any other suitable relief. She has availed to the Court decisions of the Court in ***Esther Wanjiru Magu v Steelplus Limited [2015] e-KLR***, and ***G.M.V v. Bank of Africa Limited*** where general damages for pregnancy discrimination were granted. It is in the discretion of the Court to assess the quantum of such damages. In ***G.M.V v. Bank of Africa Limited***, the Court was persuaded to grant Kshs. 3 million in damages for pregnancy discrimination, while in ***Esther Wanjiru Magu v. Steelplus Limited***, the Employee persuaded the Court to grant her damages equivalent to 12 months' salary, separate from a similar grant for compensation for unfair termination. Assessment of damages is influenced by the nature of Pleadings and Evidence placed before the Court. Overall, it is important for Parties alleging pregnancy discrimination to take the violation more seriously through proper Pleadings and marshalling of Evidence. Many Female Employees file Claims of this nature, and leave the Court without adequate damages or with no damages at all, for failing to recognize the gravity of the violation, and the need to properly plead and testify on the subject. The Court should not be left searching for a way to redress the violation, through the avenue created by a prayer for any other suitable relief. It must never be assumed that pregnancy-related discrimination is just a detail in a general claim for unfair termination, fully remediable through grant of a maximum of 12 months' salary. The violations suffered by the Claimant on account of her pregnancy must not be trivialized. She merits adequate damages for pregnancy-related discrimination. ***The Court grants her damages under any other suitable relief, for pregnancy discrimination at Kshs. 750,000.***

39. ***The Respondent shall release to the Claimant her Certificate of Service forthwith.***

40. There is no evidence at all that the Claimant owes the Respondent the sum stated to be a Counterclaim, or any other sum whatsoever. The Counterclaim is rejected.

41. ***Costs to the Claimant.***

42. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED: -

a) It is declared termination was unfair and based on pregnancy discrimination.

b) The Respondent shall pay to the Claimant: 1 month salary in lieu of notice at Kshs. 9,500; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 114,000; arrears of salary at Kshs. 28,500; and damages for pregnancy discrimination at Kshs. 750,000- total Kshs. 902,000.

c) Certificate of Service shall be released to the Claimant forthwith.

d) The Counterclaim is rejected.

e) Costs to the Claimant.

f) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 23rd day of November, 2018.

James Rika

Judge