REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 118 OF 2016

KHAYOTA SYLVIA SITAWA.....CLAIMANT

-VERSUS-

WE EFFECT (FORMERLY SWEDISH

CO-OPERATIVE CENTRE).....1ST RESPONDENT

RAOUL WALLENBERG INSTITUTE OF HUMAN RIGHTS

AND HUMANITARIAN LAW.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 8th January, 2020)

JUDGMENT

The claimant filed the statement of claim on 29.01.2016 through Owino Bukachi & Company Advocates.The claimant prayed for judgment against the respondents for:

a. A declaration that the claimant was discriminated against on grounds of pregnancy.

b. A declaration that the claimant was discriminated against on the basis of race.

c. A declaration that the disciplinary proceeding was unfair, unjust and a nullity.

d. A declaration that the respondent withholding the evidence before the disciplinary hearing was unfair, unlawful, and against the rules of natural justice.

e. A declaration that the act of the respondents of underpaying, non-paying and withholding the claimant’s basic pay and allowances was unlawful, illegal and amounts to breach of contract.

f. A declaration that the respondent’s termination of the claimant was unfair and unlawful.

g. An order for payment underpaid and unpaid salaries and benefits.

h. An order for payment of overtime.

i. An order for payment of actual pecuniary loss suffered as a result of termination from the date of termination to the date of payment with interest.

j. An order for compensation of the claimant for frustration, intimidation, harassment and discrimination.

k. An order that the respondent does forthwith issue the claimant with a certificate of service.

l. The respondent to pay:

i. General damages for discrimination on account of pregnancy and subjecting the claimant to mental torture at Kshs.10, 500,000.00.

ii. Compensation for breach of contract to December 2017 Kshs.22, 743, 860.00.

iii. Compensation for unlawful dismissal Kshs.2, 340, 000.00.

iv. Service pay on account of the claimant's good work Kshs.6, 768,000.00.

v. Pension Kshs.14, 599, 860.00.

vi. Compensation for unequal pay for work of a similar value Kshs.14, 599, 860.00.

vii. Three months' salary in lieu of notice Kshs.292, 000.00.

viii. Compensation for extra working hours Kshs.2, 000,000.00.

ix. Refund of the course undertaken by the claimant at Strathmore University Kshs.69, 900.00.

x. Compensation for medical expenses Kshs.40, 000.00.

xi. Compensation for services rendered to Swedish Probation Office Kshs.3, 500, 000.00.

m. Costs of the suit.

n. Interests on (ii) above at the rate of 20% per annum from the date of service to the date of payment in full.

o. Any other or further relief the Honourable Court may deem fit to grant.

The respondents filed the memorandum of reply on 10.11.2016 through Hamilton Harrison & Mathews Advocates. The respondents prayed that the claimant's cause be dismissed with costs.

It is not in dispute that the 1st respondent is a Swedish development corporation and having its regional office in Kenya. The 2nd respondent is a charitable trust under the Swedish private law having its regional office in Nairobi.

To answer the **1st issue** for determination the Court returns that for the period 01.02.2013 to 04.01.2016 the claimant was employed by the 1st respondent and deployed or attached to serve the 2nd respondent as a Programme Assistant. Prior to that employment the claimant provided consultancy services to the 2nd respondent from 01.06.2013 to 30.09.2011 designated as Programme Associate. Further from 13.04.2012 to 31.05.2012; 06.09.2012 to 31.10.2012; and 01.11.2012 to 31.12.2012 the claimant served the 2nd

respondent as a consultant.

The claimant's service for the period 01.02.2013 to 04.01.2016 was governed by the written contracts of employment signed between the 1st respondent and the claimant. The 1st contract was for the period 01.02.2013 to 31.12.2013. By the letter dated 02.01.2014 the 1st contract was extended to 31.03.2014. The 1st respondent and the claimant then signed the contract running from 01.04.2014 to 31.03.2015. The 1st respondent and the claimant further signed the contract commencing on 01.04.2015 to 31.12.2017. The claimant signed the contract on 28.09.2015. The terms and conditions of the contract included:

a. No probationary period applied and each party would apply three months' notice period. The notice had to be in writing.

b. The claimant was employed by the 1st respondent with attachment to the 2nd respondent.

c. The monthly gross salary was Kshs.94, 000.00 per month payable net of statutory deductions, through a bank transfer on 22nd of every month.

d. The place of work was Raoul Wallenberg Institute (RWI) situated at Eden Square, Westland's Road Nairobi, Kenya.

e. The employment of the claimant was entirely subject to RWI satisfaction with her job.

f. In event that RWI terminated the claimant's engagement, or vice versa, the contract between the claimant and the 1st respondent (the contract of service) would automatically come to an end.

g. Other terms and conditions of service were contained in the staff guidelines and regulations as were annexed and RWI rules and regulations to be availed to the claimant at the commencement of the contract.

h. The contract provided, "**10. It is explicitly prohibited to accept or be promised, request or give, promise or offer a bribe or other undue reward, remuneration, compensation, undue advantage or benefit of any kind which may constitute illegal or inappropriate behaviour.**"

The Court finds that the claimant was employed by the respondents within the foregoing terms and conditions of the contract of service. The claimant was bound by the guidelines and regulations of both respondents, she signed the contract with the 1st respondent, but the 2nd respondent assigned her duties, supervised her and could terminate the engagement. The Court finds that the respondents were the joint employers of the claimant. Each respondent in the arrangement with the claimant fit the definition of an "**employer**" in section 2 of the Employment Act, 2007 thus, "**means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.**"

The **2nd issue** for determination is whether the claimant was discriminated on account of pregnancy. The claimant has pleaded that she was discriminated against on account of pregnancy and she prays for damages. Her evidence in that regard was as follows. That in November 2014 she discovered that she was pregnant. She was afraid of disclosing that fact to her immediate supervisor one Josh Ounsted, the 2nd respondent's head of the Kenya office - because the claimant had seen how he reacted to situations with "**a quick temper**". Thus the claimant decided to adjourn the disclosure until sometimes in late February 2015. When she disclosed the fact of pregnancy, her testimony is that Josh told her that it was easier for women to go through pregnancy without working and the claimant testified that Josh narrated to her about his wife's experience and his colleagues' experiences when he worked in the 2nd respondent's Indonesia office. The claimant testified that she discussed with her colleague one Mona and who resigned because she was forced to choose between working or nursing her baby and had opted to resign - Josh had told the claimant that Mona had to organise for care of her baby and continue to work including travelling on an assignment in company of Josh to be undertaken in Tanzania. The claimant became very afraid of Josh's attitude and being pregnant, her work load increased because Mona had opted to resign and she suffered a rise in her blood pressure.

The claimant testified that on the morning of 12.03.2014 she started feeling very sick. Her Doctor advised her to go to the clinic immediately and she sent a text message to Josh to notify her predicament. The text messages exchanged between the claimant and Josh are exhibited. The claimant's last message on 12.03.2015 at 21:04 was that she left the clinic with a request that she takes bed

rest but then felt worse and as a consequence she was admitted at hospital – and therefore she would not be able to go to work the following day. She apologised for the inconveniences caused. The claimant has exhibited the note she gave to Josh issued by her doctor that she could not continue to work. When Josh received the message, the claimant testified that he called her and said, "**it looks like you shall be out of office for some time, well since you shall not be coming to work, you shall not be paid.**" And the claimant says she got shocked. The doctor imposed a complete bed rest and the claimant notified Josh and who told the claimant that she had exhausted her leave days for 2015 and she should not take to him any more doctor's chits. The claimant's further evidence was that at that time Mona had resigned and Josh was in the office all alone with a heavy workload – so that in the circumstances and in view of her predicament, it was at that time that a decision to terminate her employment was made and the letter for termination of her employment received in her email address on 08.01.2016 from Lilian Nderitu was a mere formality. The claimant's case and evidence is that immediately she took the bed rest, her name was removed from the 2nd respondent's website and between March 2015 and October 2015 she had been taken down from the website.

The claimant's case and testimony was that between the last two weeks of March 2015 to 01.04.2015 when on bed rest and admitted in hospital Josh kept on calling or texting her on whether she was out of hospital and when they would discuss the sick leave and the salary consequences of the same. Josh then told her that the 2nd respondent would not pay her for the 6 months she would be out of office and maternity leave would commence 2 months prior to the claimant's due date being in her case, June 2015. Further, Josh told her that even if she took all her outstanding 21 annual leave days and proceeded for maternity leave in June 2015, there would be some outstanding days to be accounted for and Rolf Ring, the 2nd respondent's acting Executive Director had instructed that she should not be paid and instead she should consider taking unpaid leave if she desired to continue working for the 2nd respondent. The claimant testified that she agreed to that suggestion to enjoy some peace and to lower her blood pressure. The claimant testified that Josh instructed the claimant to compute days not covered by her annul leave and maternity leave and to pay the money back to the 2nd respondent for the uncovered days.

The claimant testified that she was shocked that Josh asked her to pay back the money for missing work while he knew the claimant was unwell and with a difficult pregnancy. The claimant then offered to pay back to the 2nd respondent Kshs.54, 900.00 (to cover for 18 working days which would not be covered by the 21 working annual leave days and the maternity leave) out of the Kshs.61, 000.00 she was paid on monthly basis. She also asked Josh if she was to send the cash to either respondents or to Josh. The claimant has exhibited her email in that regard. Later Josh replied and stated that Rolf Ring had agreed that she could get her full salary and also take her full maternity and annual leave. The maternity leave was granted and it ended on 12.11.2015 but the claimant had lost the baby in the last days of May 2015.

The respondents have admitted the flow of events as per the claimant's evidence. However the respondents submit that the claimant should not be allowed to build a case for discrimination on account of pregnancy based on the conversations between the parties on how the claimant's situation was to be handled and managed. The respondents submit that in her email of 12.04.2015 the claimant expressed her gratitude to Josh for understanding and patience. On 14.04.2015 Josh wrote confirming that the claimant could start her maternity leave from 13.05.2015 instead of taking unpaid leave and as such did not need any further notes from the doctor. The respondents submit that the claimant took up the offer and took annual leave from 13.04.2015 to 12.05.2015 and maternity leave from 13.05.2015 to 12.11.2015. The contractual maternity leave was 3 months but she had been allowed to take 6 months. The respondents urge that the claimant lost the baby sometimes at the end of May 2015 after she had been on leave for about three months. Thus, it was submitted for the respondents that the unfortunate loss of the baby, sadly so, cannot be attributed to the claimant's work environment or circumstances as was alleged. Thereafter, as submitted for the respondents, the claimant send a message on 02.06.2015 indicating to Josh that she wished to report to work in July and once again expressed gratitude to Josh for his understanding. She then returned to work on 29.06.2015 of her own volition.

The Court has considered the parties' respective cases and submissions. As submitted for the claimant, under section 5(6) of the Employment Act, 2007, in any proceedings where a contravention of section 5(3) of the Act is alleged (prohibiting employer's discrimination on account of *inter alia*, pregnancy and race) the employer shall bear the burden of proving that the discrimination did not take place as alleged and the discriminatory act or omission is not based on any grounds specified in the section. In the instant case, the Court finds that as submitted for the respondent, the correspondence and conversation between the claimant and Josh shows that the parties were in genuine consultations on how the claimant's predicament was to be handled. The claimant's evidence and account is clear that she had a sick leave, she had outstanding leave days and she was due for maternity leave. In the Court's opinion, there is no evidence that in that set of circumstances, the respondents discriminated the claimant on account of pregnancy. It is true that at some point it was suggested she refunds for days falling outside the annual leave days and the maternity leave but upon consultations with Rolf Ring, the same was abandoned. The Court considers that the claimant was equally clear that for the period of sickness outside maternity leave (though blended with the issues surrounding the difficult pregnancy) the same was indeed sick leave and at no point did the respondents suggest that the claimant would not be given the maternity leave or reduce the

same in view of the sick leave days she had enjoyed. The Court considers that in any event, payable sick leave days would be liable to computation in terms of section 30(1) of the Act (and there being no other more generous contractual provision) – so that the conversation about payment of the sick days would have to be measured against the provisions of that section and the Court finds that such was a valid conversation that was not calculated to discriminate the claimant on account of pregnancy.

The Court finds that the removal of the claimant's name from the respondent's website did not amount to discrimination on account of pregnancy because it has not been established that the removal was actuated with the claimant's pregnancy status.

Thus, to answer the 2nd issue for determination the Court returns that the claimant has not established a case for discrimination on account of pregnancy and the prayers in that regard will fail. While making that finding, the Court finds that the submission for the claimant that she lost the employment as was subsequently terminated and on account of her pregnancy was farfetched and unfounded because the termination came long after the pregnancy and as at the time of termination, the claimant was not pregnant at all and there is no chain of causation established in that regard.

The **3rd issue** for determination is whether the claimant was discriminated on account of race. The claimant's case was that she should have enjoyed salary increments and accessed staff development or training funds after an evaluation like it was done for the 2nd respondent's employees in Sweden and as per the applicable respondent's policy which was unknown to the claimant. Her evidence was that all the 2nd respondent's employees were evaluated and granted salary increments. First, the Court finds that there was no evidence that the claimant was not evaluated on annual basis because she was of a different race from other employees of the 2nd respondent that may have been evaluated. Second there was no evidence that at the material time the other employees were evaluated and awarded salary increments on account that they were of a particular race . Thirdly, the evidence was that the claimant signed the contracts of service with agreed salaries which were duly paid and she must be bound by the contracts. Finally, there is no comparator to establish the alleged underpayment on account of the alleged racial discrimination. The claims and prayers in that regard will fail.

The **4th issue** for determination is whether the termination of the claimant's employment was unfair. The claimant testified that after she resumed work on 29.06.2015 she was told to work for the Swedish Probation Office and her desk was assigned to another employee. Two other employees had been employed to perform her duties while she was on maternity leave. On 16.11.2015 she wrote to the 2nd respondent's head office for assignment of duty but she was not assigned as at 17.11.2015. On that date she was given a suspension letter. She was invited for a disciplinary meeting on 11.12.2015 and she was not given evidence or information against her. Her colleague David had declined to go with her to the disciplinary hearing because he had been told if he did so he would be dealt with. The disciplinary panel told her that they wanted to terminate her employment and she was told to answer very quickly. Her evidence was that her termination started when she was pregnant. The claimant testified that at page 1 paragraph 2 of the respondent's submissions filed on 26.09.2017 it was submitted that the claimant was terminated on 13.11.2015 (being a day after 12.11.2015 when the maternity leave was due to end.) The Court finds that it will not place much weight to those interlocutory submissions especially that the respondent had expressly pleaded that the claimant was terminated on 04.01.2016. As at termination she earned Kshs.94, 000.00 and was holding the position of Programme Assistant.

The respondent's case is that by the letter dated 13.11.2015 the 2nd respondent terminated the consultancy agreement between itself and the 1st respondent on the grounds that the 2nd respondent was dissatisfied with the performance of the claimant since July 2015. Particulars of the dissatisfaction included absence from the office without permission; failure to perform the assigned tasks as required including failure to meet the agreed targets; and the nature of interaction and cooperation with colleagues at the office including writing to them with accusations of corruption. Thus, the letter requested that the claimant is placed on paid leave with immediate effect. The respondents' evidence is that disciplinary hearing took place on 11.12.2015 at the 1st respondent's boardroom.

The first allegation was that from 21st to 24th July 2015 the claimant attended training at Strathmore University during working hours without the permission from the 2nd respondent. The claimant's response per the minutes on record was that Josh did not want her to attend the training so she proceeded to pay for herself the course at Strathmore University. She attended the course at particular times and still managed to do her duties for 8 hours. She had not obtained Josh's permission because Josh had travelled to Sweden and instructed that he should not be called unless it was very urgent. The Court has considered the evidence and returns that indeed the claimant had attended the training without permission and in circumstances whereby she knew her supervisor had not approved her undertaking of the course. Even if she had paid by herself, the Court finds that it was not open for her to attend during working hours without permission to do so. In the Court's opinion, even if Josh had instructed not to be called, such was important matter and necessary permission ought to have been obtained. The respondent has established that reason for termination as per

section 43 of the Employment Act, 2007.

On the allegation of disruptive behaviour, the minutes set out particulars of alleged instances of such behaviour. She admitted confronting staff on alleged corruption against the staff and she had informed the supervisor about the allegations. The Court has considered the other allegations and returns that they were in the nature of well-founded grievances but which appear not to have been effectively resolved by the 2nd respondent one way or the other. The other grievances included for example applying her private money to accomplish tasks because she had no petty cash provided; and overlapping tasks and assignments causing confusion about the responsible employee. Such grievances would not constitute a valid reason for termination or other punishment under section 46(h) of the Act. The Court therefore finds that the termination in so far as was founded upon valid and well-founded grievances that were unresolved by the employer, the termination was unlawful and unfair to that extent.

The court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus, **"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."**

The second reason for termination was absence from office without permission or failure to notify delays while held up in traffic jams such as on 12.08.2015 and on 8th, 14th, 16th and 28th October 2015 and on 12th and 13th November 2015. At the disciplinary hearing the claimant explained that when held up in the traffic jams, she had notified Josh and she accounted for 28th October when she went for counselling with permission; and 13th November when she arrived early, went to the kitchen then the washrooms and Josh arrived later and assumed she was not in. The record of the minutes does not show material to discredit the claimant's account and the Court returns that the respondent has failed to establish that reason as per section 43 of the Employment Act, 2003.

The Court has considered the probative value of the minutes which were not signed. On 16.12.2015 the claimant wrote to Hans Lind of the 1st respondent confirming that the meeting of 11.12.2015 had taken place and she wanted to know her position because she was still on suspension. She also requested for findings of the further investigations. Hans replied the same date that he had been waiting for her at the office at 10.00am the same date but she had failed to attend as summoned and that the office was closed and the claimant was being called to a meeting on 04.01.2016 at 10.00am. By that correspondence, the Court finds that the claimant knew that she was still in the respondents' service and her case that she was terminated effective 13.11.2015 when she was due to resume from her maternity leave was unfounded. The Court further finds that there is no reason to doubt the record of the disciplinary hearing as per the minutes on record especially when considered together with the oral testimony at the hearing.

By the email dated 08.01.2016 Lilian Nderitu, the 1st respondent's HR & Administration Officer forwarded to the claimant the termination letter because the claimant had not been successfully conducted. She was paid Kshs.208, 627.50 in terminal dues being three months' pay in lieu of notice. The termination was effective 04.01.2016 and the Court finds that the effective date of termination was 04.01.2016. The letter was erroneously dated 06.01.2015 (instead of 2016).

The Court has considered the procedure leading to the termination and finds that the claimant was accorded due process as per sections 41 and 45 of the Act.

The Court has found that the claimant attended training without permission and that was a valid reason for termination. The Court has also found that the claimant was equally terminated upon raising valid grievances which were never resolved and to that extent the termination was unlawful and therefore unfair. The Court has considered the unique findings in this case and the factors in section 49 of the Employment Act, 2007. The Court has considered the otherwise diligent and long unbroken service by the claimant. The Court has considered that the claimant had desired to continue in employment. The Court has also considered that the respondents equally had the stated valid ground to terminate the claimant's service. The Court considers the aggravating factor that the claimant failed to attend the meetings convened after the disciplinary hearing to review the case as appears to have been desired by the 1st respondent. The court has considered all the circumstances of the case including removal of the claimant's name from the

respondent's website prior to the termination and to balance justice for the parties, the 1st respondent will pay the claimant 6 months compensation under section 49 of the Act for the extent that the termination was unlawful and unfair for being partially based on unlawful reason making Kshs.94, 000.00 x 6 thus **Kshs.564, 000.00** payable less PAYE.

The **5th issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court makes findings as follows:

1. The certificate of service has since been delivered as directed by the Court earlier in the proceedings and the prayer is determined accordingly.

2. Service pay is not due as submitted for the respondents because the claimant was a member of NSSF and in view of section 35 of the Act. she was equally a member of a provident fund as submitted for the respondent.

3. The evidence is that the claimant undertook training at Strathmore without the 2nd respondent's approval and without permission. The prayer for Kshs.69, 900.00 being refund on fees will fail.

4. Three months' salary in lieu of notice was paid as terminal dues and is found duly paid.

5. The claimant has not justified why the respondents should be ordered to pay her pension ass prayed for. She should pursue the payment per applicable law and regulations.

6. Compensation for unequal pay for work of equal value was not proved as prayed for and is declined as unjustified.

7. The claimant had a medical cover and the claim for compensation for medical expenses was unfounded.

8. The claim for compensation for services rendered to Swedish Probation Office were not proved and is found unjustified.

9. The Court has considered the parties margins of success and order the respondents will pay 50 % of the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant jointly or severally against the respondents for:

1. Payment to the claimant of **Kshs.564, 000.00** less PAYE by 01.03.2020 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

2. The respondents to jointly or severally pay the claimant's 50% costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Wednesday, 8th January, 2020.**

BYRAM ONGAYA

JUDGE