



Case Number:	Cause 1227 of 2011
Date Delivered:	31 Jul 2013
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Award
Judge:	James Rika
Citation:	G M V v Bank of Africa Kenya Limited [2013] eKLR
Advocates:	Mr. Geoffrey Obura instructed by Obura Mbeche & Company Advocates for the Claimant Mr. Paul Ogunde instructed by Walker Kontos Advocates for the Respondent
Case Summary:	<p><b>Issue:</b></p> <p>1. Whether an employer could terminate an employee's contract of service on the ground of pregnancy or on any other ground related to the employee's pregnancy.</p> <p><b>Employment Law</b> – termination of employment – termination of employment on grounds of pregnancy – claim that the termination of employment on the ground of pregnancy was discriminatory – where the employee averred that the termination of her contract of service was based on her pregnancy or grounds related to her pregnancy – where the employer denied that termination was based on her pregnancy but failed to show evidence that the termination was based on any other justifiable grounds – Employment Act, sections 5(3) &amp; 46.</p> <p><b>Held:</b></p> <p>1. Section 5(6) of the Employment Act 2007,</p>

stated that in any proceedings where a contravention of section 5(3) was alleged, the employer would bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act was not based on any grounds specified in section 5(6). The burden of proof was therefore placed on the employer and not the employee. This position had support in section 43 of the Act which required the employer to prove the reason for termination.

2. Once an employee established a *prima facie* case, the burden shifted to the employer, to show a legitimate explanation for termination. Where the employee demonstrated a *prima facie* case, a presumption that the employer discriminated against the employee was raised, and the employer then had to articulate a clear, specific, and non-discriminatory reason for termination.

3. The allegation that an employee was discriminated against, on account of her pregnancy was a serious one that had to be subjected to strict proof although there was no requirement for the employee to strictly prove that she was indeed discriminated against on such ground. The obligation of the employee therefore was not to establish that she had been discriminated against, on strict proof, but only to show that she had a *prima facie* case, and that the reasons advanced by the employer were unworthy of credence.

4. The employee gave adequate evidence to show at first instance, that an adverse employment decision was made by the employer, because of her pregnancies by showing that poor appraisals were timed to coincide with her pregnancies; she was subjected to appraisal by her peer yet there was no document varying her contract of employment to say that she could report to her fellow branch manager; the appraisals did not categorically state the targets she was supposed to attain, meaning they were flawed and therefore could not be relied upon to justify the termination; she had asked for training in both years the appraisals were done, and although the management agreed that there was need for her to be trained it had not been done; and, there was one letter of complaint from a customer about poor

services from her, which the employer became aware of, yet she was only required to explain about it a year later, when she was pregnant and due for termination.

5. The falsity of the explanations by the employer in justifying termination enabled the court to infer that the employer was pretending to cover up for a discriminatory purpose and once the employer's justification had been eliminated, discrimination was most likely to be the alternative explanation. The employee's *prima facie* case, combined with the employer's limping asserted justification, was sufficient to permit the court to conclude that the employee was unlawfully discriminated against on account of her pregnancies.

6. The court discouraged employees from claiming multiple remedies arising from the same wrongdoing on the part of the employer, whether the violations were claimed to infringe the Constitution, the Statute or the Contract. Ultimately, the purpose of compensatory awards was not to punish errant employers but to ensure any economic injury suffered by an employee was adequately redressed. Therefore, where a fundamental right was regulated by legislation, such legislation, and not the underlying constitutional right, became the primary means for giving effect to the Constitutional right.

7. Section 5(3) of the Employment Act outlawed discrimination on the basis of pregnancy, while section 46 made termination on the basis of a female employee's pregnancy, or any reason connected with her pregnancy, an automatically unfair decision. Remedies for such discrimination were found in section 49 of the Act, which granted *inter alia*, compensation equivalent to a maximum of 12 months salary, based on the gross monthly salary at the time of dismissal.

8. The Industrial Court could not be limited by the capping of compensatory awards fixed at a maximum of twelve months as a pregnancy discrimination claim could not be adequately redressed through the remedy of compensation granted under the Employment Act. There were far too many basic rights that were infringed, whenever an employer discriminated against an

employee, on the basis of pregnancy, which called upon the Industrial Court to move beyond the remedy of twelve months' gross salary in compensation. However, not all conceivable contractual, statutory or Constitutional rights violated deserved a separate award of damages.

*The employee's termination of service was based on her pregnancy, and therefore discriminatory, and the employer to pay her combined damages at Kshs. 3,000,000; salary in lieu of notice; service/gratuity pay; outstanding leave; and 3 days worked in March 2011 at Kshs. 1,473,006; a total of Kshs. 4,473,006.*

## **Cases**

### **East Africa**

1. *Marete, DK Njagi v Teachers Service Commission Cause No 379 of 2009* –(Explained)

2. *Ndambuki & 4 others v Delmonte (K) limited [2012] KLR* –(Explained)

3. *United States International University [USIU] v Attorney General of Kenya & 2 others* Petition No 170 of 2012–(Explained)

### **South Africa**

1. *NAPTOSA & Others v Minister of Education Western Cape & Others [2001] BCLR 338* –(Explained)

### **United Kingdom**

1. *Eastwood & Another v Magnox Electric PLC [2004] UKHL 35* –(Explained)

2. *McCabe v Cornwall County Council & Others [2004] UKHL 35; [2002] EWCA Civ 1887* –(Explained)

### **United States**

1. *Reeves v Sanderson Plumbing Products Inc 530 US 133 (2000)* –(Explained)

	<p><b>Statutes</b></p> <p><b><i>East Africa</i></b></p> <p>1. Constitution of Kenya, 2010 articles 23(3); 27(5); 41(1); 165(2)–[Interpreted]</p> <p>2. Employment Act, 2007 (Act No 11 of 2007) sections 5(3)(6); 35; 36; 41; 43; 45; 46(a); 49–[Interpreted]</p> <p>2. Industrial Court Act, 2011 (Act No 20 of 2011)</p> <p>3. Labour Institutions Act, 2007 (Act No 12 of 2007)</p> <p>4. Trade Disputes Act (Repealed)(cap 234)</p> <p><b>International Instruments &amp; Covenants</b></p> <p>1. Maternity Protection Convention, 2000 (No 183)</p> <p>2. Universal Declaration of Human Rights (UDHR), 1948</p> <p>3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1981</p> <p><b>Advocates</b></p> <p>1. Mr Geoffrey Obura for the Claimant</p> <p>2. Mr Paul Ogunde for the Respondent</p>
Court Division:	Civil
History Magistrates:	none
County:	Nairobi
Docket Number:	-
History Docket Number:	none
Case Outcome:	Claimant's termination was unlawful
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-

Sum Awarded:

Kshs. 4,473,006

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**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 1227 OF 2011**

**BETWEEN**

**G M V.....CLAIMANT**

**VERSUS**

**BANK OF AFRICA KENYA LIMITED .....RESPONDENT**

*Rika J*

*CC. Elizabeth Anyango*

*Mr. Geoffrey Obura instructed by Obura Mbeche & Company Advocates for the Claimant*

*Mr. Paul Ogunde instructed by Walker Kontos Advocates for the Respondent*

ISSUE IN DISPUTE: TERMINATION OF EMPLOYMENT ON THE GROUND OF PREGNANCY

AWARD

*A. The pleadings and the evidence*

1. The Claimant alleges she was initially employed by the Respondent Bank, on 1<sup>st</sup> November 2006, in the position of Relations Officer. She rose through the ranks, becoming Manager, Agence Elite, at the Respondent's Ngong' Road Branch Nairobi, as of 4<sup>th</sup> March 2011 when her contract of employment was terminated.

2. She claims she was pregnant with her first baby and proceeded on maternity leave on 15<sup>th</sup> January 2009, resuming on 4<sup>th</sup> May 2009. Sometime in August/ September 2010, the Respondent learnt the Claimant was expecting a second baby. It was not a trouble- free pregnancy; according to the Claimant she took sick leave between 22<sup>nd</sup> February 2011 and 1<sup>st</sup> March 2011, to attend to sickness associated with her second pregnancy.

3. She resumed duty on 2<sup>nd</sup> March 2011. She was asked to see the Respondent's Managing Director the following day, 3<sup>rd</sup> March 2011. She did so, and was informed by the Managing Director that:-

*a. Employing her was an expensive affair, given the fact that she was pregnant yet again, and had to proceed on maternity leave;*

*b. Her services were no longer required;*

c. *A replacement for the Claimant had been found to fill Claimant's position of Manager, Agence Elite at Ngong' Road;*

d. *The Claimant had failed in the performance of her duties; and*

e. *The Claimant was advised to find the means to meet her mortgage obligation with the Respondent immediately, otherwise her terminal benefits would be applied in satisfying the mortgage obligation;*

4. The Claimant was aggrieved by this decision and filed this Claim, seeking the following orders:-

a. *A declaration that the Claimant's termination of employment on account of pregnancy, amounted to a violation of the Claimant's rights under Section 5[3] of the Employment Act Number 11 of 2007;*

b. *A declaration that termination was in violation of the Claimant's constitutional rights in particular: [i] Article 27 [5] and [ii] Article 41[1] of the Constitution of Kenya;*

c. *A declaration that the Claimant's termination was in violation of Sections 45 and*

*46 [a] of the Employment Act and therefore unfair;*

d. *A declaration that the termination was in breach of the Claimant's contract of employment;*



e. *A declaration that failure to release the Claimant's terminal dues as required by Section 36 of the Employment Act read together with Clause 8.1 of the contract is illegal and intended to blackmail and intimidate the Claimant;*

f. *A declaration that failure to release the Claimant's terminal benefits, until she renounces her demands for compensation for unfair termination amounts to subjecting the Claimant to servitude and hence unconstitutional;*

g. *A declaration that to make payment of Claimant's dues conditional upon her declaration that she renounces further court action amounts to placing fetters on the Claimant's right to access justice;*

h. *A declaration that the Claimant is entitled to be compensated for:*

- *Violation of her constitutional rights as envisaged under Article 23 [3] and 41[1] of the Constitution.*
- *Violation of her employment, legal and contractual rights.*
- *Neglect and refusal by the Respondent to fulfill contractual demands.*
- *Injury of the Respondent on account of the Respondent's breaches.*

*[i] An order that the Respondent directs the Administrator and Trustees to the Claimant's Pension benefits to release the Claimant's entitlement to pension benefits under the pension rules;*

*[j] An order that the Claimant be compensated as follows:*

- *Loss of three months' maternity leave entitlement as an employee at Kshs. 540,000.*
- *Loss of medical benefits associated with childbirth incurred to-date at Kshs. 261,808.*
- *General damages for discrimination on account of pregnancy and subjecting the Claimant to servitude and mental torture at Kshs. 3,000,000.*
- *Future loss of medical benefits to the Claimant and her two children over 12 months at Kshs. 2,640,000.*

- *Salary in lieu of notice at Kshs. 540,000.*
- *Severance pay on account of the Claimant's excellent service at Kshs. 833, 560.*
- *Payment in lieu of leave days earned at Kshs. 75,833.*
- *Salary for days worked in March 2011 at Kshs. 17,613.*
- *Twelve months' salary in compensation for wrongful termination at Kshs. 2, 184,000*
- *Loss of subsidized interest on mortgage loan for 12 months, to be quantified.*

*[k] Interest on the above compensation at the rate of 20% per annum from the date of termination of service to the date of payment in full;*

*[l] Costs of the Claim; and,*

*[m] Any other or further reliefs the Honourable Court may deem necessary to award.*

5. The Respondent filed a Statement of Reply on 6<sup>th</sup> August 2011. It is conceded that the Claimant was employed by the Respondent; the letter of employment is dated 1<sup>st</sup> November 2006; the Claimant was confirmed in employment on 11<sup>th</sup> June 2007; her salary was adjusted upwards on the 19<sup>th</sup> March 2009, 25<sup>th</sup> May 2009 and 19<sup>th</sup> February 2010; she was granted a loan by the Respondent to purchase a residential house; and her contract was terminated by the Respondent through a notice dated 4<sup>th</sup> March 2011. These facts are conceded.

6. It is denied that termination was unfair, or based on the reasons given by the Claimant in her Statement of Claim. Her contract was terminated lawfully, under Clause 8.1 of the contract of employment. The Claimant signed the employment contract, agreeing that termination could be carried out through issue of 3 months' written notice of termination, or payment of 3 months' salary in lieu of notice. The Claimant's performance was below average and unsatisfactory. She was appraised and found wanting. Her claim that she was discriminated against, on account of pregnancy, is fanciful and an attempt at extorting money from the Respondent. The Respondent recognizes and respects the rights of its female employees to go on maternity leave. The majority of the prayers sought, in particular the declarations with regard to the Constitution, are not within the jurisdiction of the Industrial Court. This Court can only grant the remedies under Section 15 of the Labour Institutions Act No. 12 of 2007.

### *B. The Claimant's Case*

7. The Claimant gave evidence on 13<sup>th</sup> December 2011, 18<sup>th</sup> October 2012, 7<sup>th</sup> November 2012 and 23<sup>rd</sup> November 2012 when she closed her case. Alice Wangari Kaaru Regional Manager of the Respondent, and Mary Muthoni Kariti who worked as the Respondent's Human Resources Manager at the time the Claimant's contract was terminated, testified on behalf of the Respondent on 23<sup>rd</sup> November 2012. Phyllice Gitumbi, the Respondent's Head of Marketing testified on 6<sup>th</sup> December 2012, when the Court marked the proceedings as closed. The dispute was last mentioned on 18<sup>th</sup> February 2013 when the Parties confirmed the filing of final arguments, and were advised Award would be delivered on Notice.

8. The Claimant adopted the contents of her Statement of Claim, in her evidence before the Court. She explained that the Respondent is a Bank, registered in Kenya. It started its operations in Kenya in 2004.

It is part of the Bank of Africa Group, with its Head Office in Mali, West Africa.

9. Vundi was employed on 1<sup>st</sup> November 2006 by the Respondent, as a Relations Officer. She served probation of six months, and was confirmed on 11<sup>th</sup> June 2007. She handled personal accounts. Her terms and conditions of employment were also subject to the Human Resource Management Manual. Her contract of employment granted her 30 days of annual leave each year. She was entitled to payment in lieu of unutilized leave days. Her basic salary was Kshs. 106, 250, and house rent allowance of Kshs. 18,750. She was entitled to loan facilities; three months' notice, or three months' salary in lieu of notice if the Respondent was to terminate the employment; and thirteenth month salary or an amount proportionate thereto, for any period worked during the year.

10. The Manual granted the Claimant three calendar months in maternity leave with full pay; medical cover for herself, and up to four of her children; subsidized mortgage loan; and several other benefits including construction loan, car loans, personal loans, education loans, short term loans etc.

11. Her gross salary was reviewed up to Kshs. 160,000 effective from 1<sup>st</sup> January 2009. From 1<sup>st</sup> June 2009, her new grade was Senior Banking Officer grade 4A. Her job title remained unchanged. On 19<sup>th</sup> February 2010, she was transferred by the Respondent to serve as Manager of Respondent's Agence Elite, housed at Ngong' Road Branch. Her salary was raised to a monthly gross of Kshs. 182,000. The salary review reaffirmed Respondent's evaluation of the Claimant's work as good. She was entitled to residential loans, construction loan, and car loan under clause 6.10 of the Manual. She took a loan of Kshs. 5.1 million from the Respondent, on the strength of this clause. The loan would be subject to 4.9% interest chargeable on 90 days treasury bills, less 2%. At the time of termination, the loan attracted interest of 4.7%. This rate applied so long as the Claimant remained an employee of the Respondent. This was payable in 240 equal monthly installments.

12. Ngong' Road Branch was not functional when the Claimant was transferred there, on 19<sup>th</sup> February 2010. Repair work was underway. Licensing of the Branch by the Central Bank was delayed. There were teething problems at the time the Claimant was transferred. Operations were not smooth. The Branch was understaffed and systems were not in place. Management was aware of these teething problems.

13. Meaningful operations at the Bank did not start until sometime in March 2010. Construction work was completed in May 2010. The Claimant was not given work targets for the period 1<sup>st</sup> January 2010 to 30<sup>th</sup> April 2010. The targets were issued in the month of May 2010. Her targets involved the enrollment of existing customers who were seen to be High Networth Individuals [HNW1], and to recruit new such customers, upon completion of the first enrollment.

14. In conducting the Claimant's appraisal for 1<sup>st</sup> January 2010 to 30<sup>th</sup> June 2010, the Respondent appraised the Claimant as if she had been assigned tasks between January and April 2010, which she failed to perform. The fact that the Branch was not fully operational was ignored. At the time of appraisal in June 2010, the Claimant had only been actively involved in her role for only two months.

15. From 1<sup>st</sup> July 2010 to 30<sup>th</sup> November 2010, the Ngong' Road Branch experienced teething problems which included lack of adequate staff, and office infrastructure. This was brought to the attention of the Managing Director, by the Claimant's supervisor, but the Managing Director failed to address the issue. The Claimant was nonetheless appraised on the assumption that Ngong Road Branch had been operational the whole year. The resulting appraisal was misleading, and manipulated by the Respondent, to justify termination of the Claimant's services.

16. Sometime between August and September 2010, the Respondent became aware that the Claimant

was pregnant with her second baby. On 26<sup>th</sup> November 2010, the Claimant was on leave. The Respondent wrote to her a letter, seeking explanation about an incident that took place in 2009. A customer Vermont Flowers limited had complained about poor services from the Claimant in 2009. The Claimant had responded then, but was surprised to receive the same enquiry from the Respondent while on leave in November 2010 more than one year after the issue arose. She felt that the Respondent was crafting a case against the Claimant to justify termination.

17. Due to problems with her pregnancy, the Claimant again took sick leave between 22<sup>nd</sup> February 2011 and 1<sup>st</sup> March 2011. She went back to work on 2<sup>nd</sup> March 2011. The Managing Director called for her on 3<sup>rd</sup> March 2011, and told her employing her had become an expensive affair, given that she was pregnant yet again, and had to proceed on maternity leave. The Managing Director told her he had sourced another employee. Her contract was terminated because she was an expensive employee. The claimant felt discriminated against on account of pregnancy. She felt she was victimized.

18. Prior to the meeting with the Managing Director of 3<sup>rd</sup> March 2010, the Claimant had not been forewarned of the allegations raised against her by the Respondent. She had no idea what would be the days' agenda with her Managing Director. The Respondent knew the Claimant was due to get her second baby in two weeks' time. On 4<sup>th</sup> March 2011, the Respondent lived up to its threats, and terminated the Claimant's contract of employment.

19. The Claimant refuted the allegation by the Respondent, that termination was justifiable and grounded on her poor performance. She worked from November 2006 to 3<sup>rd</sup> March 2011. The appraisal for 2009 was carried out in January 2010 by her former boss Patrick Kitonga. Her rating was not good. She agreed with the appraisal, but asked for further training. Kitonga agreed with her on the training, but none was forthcoming. The Claimant also raised the issue of the period of appraisal. The Branch had only operated for six months. The Claimant did not work the whole of 2010. She was expectant and due for delivery in March 2011.

20. Agence Elite dealt with premium banking. The Claimant was to report to the Retail Manager at the Head Office. Another Officer Alice Kaaru was in charge of the retail business at the Ngong' Branch. The Claimant was not a Retail Manager, but Manager Agence Elite. Alice was in the same grade with the Claimant. The Claimant was to be appraised by the Retail Manager from the Head Office. For the period from January 2010, appraisal was done by Alice Kaaru. The Claimant testified that this was wrong, as she did not report to Alice Kaaru. The appraisal was done on the instructions of Phyllice Gitumbi, Retail Manager based at the Head Office.

21. Vundi prays the Court to grant her Claim. She clarifies that she does not wish to pursue the claim for loss of staff interest rate on the mortgage. Her mortgage has continued to attract the staff interest rate, which applied during her employment.

22. On cross-examination, Vundi testified that she holds a Bachelor of Science Degree, Finance Option. She agreed with the terms and conditions of employment given in her letter of employment. Clause 8.1 allowed either Party to terminate the contract through notice or notice pay. Appraisal began when targets were given. The Departmental Committees gave the targets. The targets were not discussed with the individual, and there would be no recourse for impossible targets. Targets were given at the beginning of each yearly quarter.

23. The Claimant did not think the targets were unachievable. She complained that she was assessed for the whole period while the Branch had not been fully operational for the period of appraisal. She complained to Alice Kaaru about the period that was used in carrying out the appraisal. She did so orally

and also on the appraisal forms. Her complaint was not acted upon. She continued to work to achieve the targets. She found it strange that Alice appraised her. The Claimant complained to the Retail Manager, about the fact that Alice was the Officer doing the appraisal. The Claimant was allowed to give herself a rating in all the forms. She indicated that her targets *'were partially met.'*

24. She testified that she did not agree with the reason given by the employer for termination. The reason was stated to be *'failure to meet targets.'* She conceded she did not meet all her targets. She however pointed out that her Branch was not operating full throttle. She testified that even after the Branch was operational, she did not meet her targets in full. She maintained termination was on the basis of her pregnancy. She did not have any document in Court to show termination was on account of pregnancy.

25. Redirected in her evidence, the Claimant testified that she had already delivered her second baby, and it was not expected that she would have the pregnancy in Court, as a piece of evidence. She failed to meet her targets because they were based on the full year, yet she only worked six months. The Human Resource Manual amended her letter of employment. Clause 10.8 dealt with offences. The Manual governed breach of procedures and failure to meet the standards. The employee would be entitled to first and second warnings. Clause 10.11 provided for the disciplinary procedure. The Claimant did not appear before any Disciplinary Committee. Clause 2.7 prohibited discrimination against an employee. She was discriminated on account of her pregnancy. Vundi testified that although her contract provided for termination by notice, or pay in lieu of notice, her Claim is based on unfair termination, arising from these violations by the Respondent.

26. The Claimant was recalled on 23<sup>rd</sup> November 2012 when she testified further that on 3<sup>rd</sup> March 2011, she was informed the Managing Director wanted to see her. It was the Branch Manager who called her. She presented herself to the Managing Director. This was when she heard about termination. The Managing Director asked for her personnel file from Human Resources Manager Mary Kariti, to confirm the Claimant's commitments with Bank. At the time the Managing Director informed the Claimant about termination, Mary Kariti was not there. In further cross-examination, Vundi told the Court that the meeting with the Managing Director was at 8.30 a.m. She was told her contract was going to be terminated; she was no longer needed; and she had become an expensive employee. This was told to her by the Managing Director in the absence of Mary Kariti. Vundi prays the Court to allow her Claim.

### C. Respondent's Case

27. Alice Wangari Kaaru is a Regional Branch Manager of the Respondent. She worked with Vundi from February 2010 to March 2011. Alice was in charge of the Ngong' Road Branch, while the Claimant was running the Elite Unit, as the Relationship Manager. The Branch commenced operations on 16<sup>th</sup> February 2010. The physical infrastructure was being revamped. The Claimant was not supposed to be idling. She had products to sell. She had space, computer, desk and telephone. She was not locked out.

28. Alice was responsible for the Unit as the Manager. She was the Claimant's Supervisor. Targets were given on clear performance indicators. The Claimant did not meet her targets. The targets were set between March and December 2010. Review was done quarterly, and in terms of business continuity, every week. Vundi never met her weekly obligation. The appraisal for January to March 2010 was acknowledged by the Respondent not to be objective, as the Branch opened in February 2010. The Respondent took account of the time the Branch was not operational.

29. Targets are for the whole year, broken down in quarter and month. The Claimant never complained to Alice directly about the appraisal. Alice was not aware of any other complaints made to other persons.

Other than the comments the Claimant registered on the face of the appraisal forms, there were no other complaints. The targets were discussed with the employee. There was mutual understanding of the process.

30. On cross-examination, Alice testified she was employed on 2<sup>nd</sup> February 2010. She had served CFC Stanbic for 15 years before. She was given a letter of appointment by the Respondent and was on probation up to August 2010. Alice found Gladys already at work. She did not know how long the Claimant had been working for the Respondent, by the time Alice joined the Respondent. Alice could not say if Vundi had been employed by the Respondent for ten years, at the time Alice joined. Alice found Vundi already working at the Ngong' Road Branch, as Manager, Elite Banking. Elite Banking was not yet operational. Alice was on probation for six months.

31. She never saw the Claimant's letter of appointment, but was advised by Phillice Gitumbi that the Claimant served as Relationship Manager. The Claimant's letter on transfer to Ngong' Road Branch indicated she transferred as Manager Agence Elite. She was to report to the Retail Manager, and not to Alice. However, reporting was made to Alice. Alice was still serving probation. The witness managed the General Branch, while the Claimant was managing Specific Branch, Agence Elite. The Agence Elite was a specialized service, serving priority clients. There is no letter that directed Vundi to report to Alice.

32. There was no letter varying the Claimant's appointment as Manager Agence Elite. Alice testified that she was not at the same level with Vundi. Elite was not a Branch but a Unit. She conceded however that the word 'Unit' did not appear in the letter directing the Claimant to Ngong.' The Claimant was the Manager of a Unit called 'Elite.'

33. Alice testified further on cross-examination that the Claimant was appraised between January and December 2009. There were no targets given between March and July. The target for July to September 2009 referred to Kshs. 100 million. Alice was not able to say if this was the target set for the Claimant for the whole year. The forms did not show if these were annual targets. Monthly and quarterly targets were not indicated. Appraisal for January to March 2010 was not objective. Alice was employed in February 2010. Agence Elite opened in May 2010. The witness was advised the Claimant lost employment for non-performance. Alice did not know what the procedure for termination under the Human Resources Manual, entailed.

34. The fact that she was on probation did not prevent her from exercising her management role. Alice stated further in redirection, that the letter transferring the Claimant did not say Agence Elite was a Branch. It is a Unit within a Branch. Alice was employed in February 2010. She reported to the Retail Manager Head Office, who also instructed her to supervise Vundi. The Claimant did not complain about this, or refuse to report to Alice. The witness signed the appraisal for October to December 2010, based on her interaction with Vundi.

35. Mary Muthoni Kariti holds a Diploma in Human Resources and Labour Relations. She also has achieved a Bachelors Degree in Human Resources Management. She is conversant with the Labour Laws of Kenya. She worked for the Respondent as the Human Resources Manager until June 2011.

36. She testified that she knew Vundi. She signed the Claimant's letter of termination of employment, dated 4<sup>th</sup> March 2011. She attended the meeting referred to in the termination letter, which took place on 3<sup>rd</sup> March 2011, and which involved the Managing Director and the Claimant. The meeting was held at 10.00 a.m. at the Managing Director's Office.

37. Vundi was asked by the Managing Director, in the presence of Mary, how Agence Elite was doing.

She answered that Agence Elite, was doing okay. The Managing Director wished to know why there were no positive results from Agence Elite. Vundi answered that about nineteen accounts had been opened. She also said she did not have enough support staff. Vundi told the Managing Director that she had not forwarded her concern about insufficiency of staff, to her Manager. After this, she was told her contract would be terminated for poor performance. The issue of pregnancy did not arise. She was not told that she had become an expensive employee.

38. The Human Resources Manual Clause 10.9 [8] referred to offences and sanctions. It required that an employee is given two warnings before dismissal. It related to cases where an employee had flouted Bank Regulations. It did not apply to Vundi's case. Clause 10.9 [26] on incompetence or inefficiency in the performance of her normal duties would not apply. There was a grievance procedure at the workplace, which the Claimant did not utilize, in her complaints about the performance targets. She did not lodge any complaint to say that she was appraised unfairly.

39. Mary told the Court on cross-examination that she left employment on early retirement in June 2011. She served for 20 years, from 1990 to 2011. She met the Managing Director on 3<sup>rd</sup> March 2011. She had just come from her leave. She had called Vundi before proceeding to the Managing Director's Office. Mary knew about the Claimant's employment record, but was unaware about her promotion. The role of a Manager is to manage people. It is a role that goes with responsibility.

40. The witness testified that Vundi was a Relationship Officer before transfer. In March 2009, her salary was raised to Kshs. 160,000. In May 2009, her job was graded. She transferred to Agence Elite in February 2010. She was given a new title, with added responsibility. She was to report to the Retail Manager. The two were not of the same rank. Mary did not know of a letter to Vundi, directing her to report to any other person. In Mary's view, the Retail Manager would appraise the Claimant.

41. On operational issues, she reported to the Branch Manager. There was no letter directing her to report to the Branch Manager. There was no letter issued to Vundi interrogating her performance, before the meeting with the Managing Director. There was no warning letter. The Ngong' Branch Manager was Alice. Mary did not know if Vundi complained about staff shortage, to Alice. Alice was employed in February 2010, and could not evaluate the Claimant for work done in January 2010.

42. Mary stated she did not know when Agence Elite opened. She did not know why Vundi came to Court. She recalled the Claimant's contract of employment was terminated. Mary did not recall what targets were set for Vundi in 2010. She denied that she was called as a witness by the Respondent, to merely come and tell the Court that she wrote the termination letter.

44. If someone failed to perform, it amounted to incompetence on her part. In other words, the witness stated, the Claimant's letter of termination referred to incompetence. The Human Resources Manual called for first and second warning before dismissal. Clause 10.11 called for an opportunity to be heard. The Managing Director and the Human Resources Manager constituted the Human Resources Committee. The Claimant was not invited to a Human Resources Committee on 3<sup>rd</sup> March 2011. She was not given the first and second warning. Mary stated that she understands well the concept of fair hearing. It is a fundamental right.

45. In concluding her testimony on cross-examination, Mary stated that she was aware Vundi was pregnant, and due to have the baby in about three weeks' time. She denied ever expressing her sympathy to the Claimant, for the rough treatment the Claimant received from her employer. It was not true that Mary just found the Claimant in the Office of the Managing Director with the Managing Director, where the Managing Director announced termination of the Claimant's contract of employment. Vundi

was not discriminated against, and was not inhumanely treated.

46. In re-examination, Mary testified that she called Vundi on 2<sup>nd</sup> March 2011, and asked they meet on 3<sup>rd</sup> March 2011 in the Managing Director's Office. Mary did not find Vundi already seated in the Managing Director's Office; the two ladies arrived there at the same time. The Retail Manager had made comments in the appraisal dated 6<sup>th</sup> January 2011, stating that the Claimant's performance was unsatisfactory.

47. Phyllice Gitumbi is the Head of Marketing, Bank of Africa. She joined the Bank as the Manager, Ruaraka Branch, in November 2008. Ideally, one is employed before the Bank is fully operational, for induction. This is how the witness was employed. The employee is expected to grow with the Branch. Phyllice was given targets for the year 2009, to be met before the year ended. The targets came before the Branch was operational. She worked as Manager up to June 2009. Her position changed to Retail Manager, where she headed the Retail Docket. The arrangement was not restricted to Ruaraka Branch; it was the case with other Branches such as Galleria and Upper Hill.

48. Phyllice was familiar with Vundi. The two worked together, but in different departments, even before the Agence Elite opened. Ngong' Road opened in February 2010. Phyllice was responsible for business growth. She set targets. Vundi was in charge of Agence Elite Unit. Targets were set from March to December 2010 for V. She did not complain about the targets. The targets were not from January 2010 as alleged by the Claimant, but from March to December 2010. Vundi did not complain about the work infrastructure.

49. Upon transfer to Agence Elite, the Claimant was to report to Phyllice the Retail Manager. In terms of overall performance, the Retail Manager needed to know what was happening. In terms of day to day business, she reported to Ngong' Road Branch Manager Alice. Alice in return, reported to Phyllice. Vundi did not complain about the reporting system. Alice did not set any target for the Claimant. The Retail Manager did not appraise Vundi in a first line exercise, but only appraised her at the ultimate stage. This was so, because Phyllice set the targets.

50. In the Claimant's appraisal of October to December 2010, it was expected deposits at the Branch would grow from 0 to 100 million Kshs. By end of December 2010, actual growth was Kshs. 34.7 million. There was a variance of Kshs. 63.7 million. From July 2010 to September 2010, the Claimant was given a target of Kshs. 100 million in deposits growth. The actual growth achieved was Kshs. 46.8 million, with a variance of Kshs. 53.2 million. The deposits in the July to September 2010, when compared to deposits in October to December 2010, showed the Bank to have recorded negative growth, from Kshs. 46.8 million to Kshs. 34.7 million. Phyllice concluded the Claimant's performance was poor, and recommended her replacement.

51. The witness told the Court on cross-examination that she joined the Respondent in November 2008. Before then, she worked for the Housing Finance Corporation of Kenya (HCFK), as a Branch Manager. She was dealing with savings and mortgages while at HFCK. She was employed by the Respondent and posted to Ruaraka as Manager. Ruaraka was an ordinary Branch. She was under probation for six months.

52. It took two to four weeks to induct an employee. If a customer found the new Branch not to be fully operational, the customer would probably move on to another functional Branch. The witness did not see this as limiting the performance of the un-operational Branches. She did not carry to Court the statistics of the Ruaraka Branch at the time she inaugurated it. She did not have her appraisal forms, testifying that she had come to Court to give evidence on Ngong' Road Branch.



53. The letter transferring Vundi was signed by the Respondent's Directors. All Branches were headed by Managers. Vundi was not a Branch Manager. Her letter of transfer referred to Manager, Agence Elite. This was a Unit, not a Branch. Phyllice conceded the word Unit did not appear in any of the transfer documents. Vundi was sitting in a Branch, and not supposed to be reporting to the Retail Manager. Everybody working in a Branch, reported to the Branch Manager. The decision of the Directors who signed the Claimant's transfer was binding on all parties. The witness rejected the suggestion that V was a Manager in Agence Elite Branch; this was not a Branch but a Unit.

54. Agence Elite was created to attract high-end clients. The responsibility for this outfit was not carried out by the Branch Manager Alice. Phyllice did not recall that Vundi wrote an e-mail to her, complaining about the reporting structure. Phyllice set the targets for all Branches and evaluated all Branch Managers. There was only one Agence Elite. Vundi was chosen to head Agence Elite. It was not necessarily because of her experience.

55. The Claimant was employed just before the Branch opened. It was in February 2010. She would be on probation up to August 2010. Phyllice did not know if the Claimant handled elite banking before. The Retail Manager was not involved in the Claimant's appraisal in 2009. She complained about training. The Manager appreciated the need for training. Phyllice was not able to say if the Claimant received this training. Elite started in March 2010 when the Claimant was given her targets. She raised training concerns in 2010. The target of Kshs. 100 million in deposits growth was for one year. Quarterly targets were not shown in the appraisal forms. Phyllice recommended that the Claimant be replaced. She did not call the Claimant for discussion, before making the recommendation.

56. The witness emphasized on re-direction, that she did not receive any complaints from V on reporting lines. Agence Elite was not a Branch.

#### D. Claimant's closing arguments

57. The Claimant submits that the Respondent's assumption, that it had the capacity to terminate the services of the Claimant as a matter of right, was a misconceived legal phenomenon, in light of Section 43 of the Employment Act 2007. Hearing was denied the Claimant as demanded by Section 41 of the same law. The Human Resources Manual in any event, superseded the termination clause contained in the letter of appointment. Accusations against the Claimant merited warnings before termination. Termination was not on the ground of poor performance; termination was on the ground of pregnancy. The Claimant's evidence that she was told she had become an expensive employee by her employer, and immediately sacked, was not rebutted through evidence by the Respondent. Mary Kariti who wrote the letter of termination conceded the Respondent knew the Claimant was pregnant.

58. The Claimant prays the Court to find that her Constitutional, Contractual and Statutory rights were violated. She pleads the Court to grant the remedies stated at the outset of this Award.

#### E. Respondent's closing arguments

59. The allegation that the Claimant was discriminated against on account of her pregnancy is a serious allegation, which ought to be subjected to strict proof. No adequate evidence was given by the Claimant to support this claim. Mary Kariti was present at the time of termination, and confirmed pregnancy was not the reason given in justifying termination. Clause 8.1 of the contract of employment allowed either party to terminate the contract upon giving of written notice, or pay in lieu of notice. The Respondent urges the Court to find persuasion in the High Court of Kenya Judgment in **Joseph Ndambuki & 4 others v. Delmonte limited [2012] e-KLR**, where the Court upheld the validity of termination at the will

of the employer. The Court ought to uphold parties' contracts.

60. This position is supported by Section 35 of the Employment Act 2007, which recognizes the validity of termination on notice. What parties agree in their contract of employment as a means of termination is sufficient reason under Section 43 of the Employment Act, unless notice is given to mask reasons that are prohibited under Section 46. Giving additional ground for termination, beyond the justification afforded by the termination notice, is not overall prejudicial to the employer, in justifying termination. The Claimant was repeatedly assessed and found to have failed to meet targets. The claim for damages of Kshs. 3,000,000 in the alleged discrimination would be in any case a gross exaggeration. The Constitutional Division of the High Court of Kenya, hardly awards more than Kshs. 500,000, even for the most blatant violations. Termination was lawful and an award of twelve months' salary in compensation would not be merited. If the Court was to find termination unfair, the Respondent asks the Court to grant three months' salary in compensation at most.

**F. THE COURT FINDS AND AWARDS:-**

61. G M V was employed by the Bank of Africa Kenya Limited, on 1<sup>st</sup> November 2006. Her contract of employment dated 1<sup>st</sup> November 2006, designated her as Relationship Officer. She was confirmed in this position with effect from 1<sup>st</sup> June 2007, having completed a probationary period of six months. She started off on a basic monthly salary of Kshs. 106,250, house rent allowance of Kshs. 18,750, bringing her total take-home to Kshs. 125,000. Her terms and conditions of employment were contained in this written contract, and also in the Bank's Human Resource Staff Handbook.

62. On 19<sup>th</sup> March 2009, her salary was reviewed. The basic component was raised to Kshs. 136,000, house rent allowance to Kshs. 24,000- total Kshs. 160,000. On 25<sup>th</sup> May 2009, she was advised by her employer that with effect from 1<sup>st</sup> June 2009, her new grade became Senior Banking Officer Grade 4A. Her job title remained unchanged.

63. On 19<sup>th</sup> February 2010, she received a letter from the Respondent advising:

*"Following the opening of Agence Elite, we wish to advise as discussed earlier, of your transfer to the above as **Manager, Agence Elite**. This position will report directly to the Retail Manager in Head Office. The transfer is effective 1<sup>st</sup> February 2010. Your new title and job description are detailed in Schedule 1 which is enclosed. All other terms and conditions of your employment remain unchanged. Please sign and return the duplicate copy in acknowledgement."*

64. This letter is signed by J.G. Pastouret, Deputy Managing Director and K. Ahadzi, the Managing Director. Vundi moved as instructed. On 8<sup>th</sup> March 2010, her salary was reviewed. The basic rose to Kshs. 154,700, house rent allowance to Kshs. 27,300- total Kshs. 182,000 per month. Things were looking up for Vundi.

65. One year later, on 4<sup>th</sup> March 2011 however, the Respondent terminated her contract of employment. The Managing Director, together with the Human Resource Manager, had met the Claimant the previous day, 3<sup>rd</sup> March 2011. There is no agreement on what was said in this meeting. The outcome is undisputed. The Respondent made a decision to terminate the Claimant's contract of employment, justifying its decision, on the following grounds:-

- a. Claimant's failure to meet performance targets since January 2009, by scoring below average.

b. Her failure to improve performance as recommended by her supervisors in her performance appraisals for 2009 and 2010.

c. Complaints against the Claimant, by some customers of her conduct on their requests.

The Respondent grounded its decision on clause 8.1 and 8.2.4 of the contract of employment. She was offered the following benefits – balance of leave (12.5 working days) at Kshs.75,833; salary up to 3<sup>rd</sup> June (March") 2011 at Kshs. 17,613; and 3 months' salary in lieu of notice at Kshs. 546,000, adding up to Kshs. 639,446. Considering the number of years she had served with the Bank, the Respondent offered to pay her an *ex gratia* of Kshs. 833,560, bringing the exit package to Kshs. 1,473,006. She would be paid in addition, the sums due from her Staff Provident Fund. The termination letter explained to the Claimant further that she had been advanced Mortgage Loan of Kshs. 6,000,000, which stood at Kshs. 4,749,985 on the date of termination, a debt which she was asked to arrange to pay, failing which her terminal benefits would be applied to partially settle her mortgage obligation.

66. The Claimant did not agree with the reasons given by the employer in terminating her contract of employment. She felt the actual reason was that she had for the second time in two years, become pregnant. She graphically testified how the Managing Director informed her on 3<sup>rd</sup> March 2011, that she had become an expensive employee, due to her persistent pregnancies. There is no doubt she had proceeded on maternity leave on 15<sup>th</sup> January 2009, and resumed duty on 4<sup>th</sup> May 2009, during the birth of her first baby. On 20<sup>th</sup> December 2009, she took her annual leave, as she readied herself to move to Agence Elite. She resumed in January 2010, and was transferred to Agence Elite with effect from February 2010. As of September 2010, the Respondent was aware the Claimant was once again, pregnant. She expected to deliver in March 2011. Between 22<sup>nd</sup> February 2011 and 2<sup>nd</sup> March 2011, the Claimant had taken sick off. The sickness was pregnancy related. It was not clear to the Court why, the Claimant had not in her final trimester, proceeded on maternity leave. Her baby was due in three weeks' time, on the date of termination.

67. In paragraph 5 and 6 of the Respondent's submissions, the Respondent holds that the only evidence the Claimant adduced, that termination was on account of pregnancy, was that she was told so by the Managing Director. The allegation that she was discriminated against, on account of her pregnancy, is serious, and ought to be subjected to strict proof. She did not offer such strict proof in her evidence, the Respondent submitted.

68. The Court must make it clear that there is absolutely no requirement for ladies who claim to have been discriminated against by their employers on the ground of pregnancy, to strictly prove that they were indeed, discriminated against on such ground. The starting point is Section 5(6) of the Employment Act 2007, which states:

*" In any proceedings where a contravention of Section 5 (3) is alleged, 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 this Section.”*

This law places the burden of proof on the employer, not the employee. This position has adequate support in Section 43 of the Act, which requires the employer to prove the reason for termination. Section 5(3) states that no employer shall discriminate directly, or indirectly, against an employee, or prospective employee, on the ground of pregnancy, among other grounds.

69. All the ladies are required to do, is establish a *prima facie* case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to:-

- Establish she belongs to a protected class.
- Demonstrate she qualified for the job she lost.
- Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide *prima facie* proof, that other explanations by the employer are *pretextual*, and the real reason for termination was the pregnancy.
- Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy.

70. Once the employee has established a *prima facie* case, the burden shifts to the employer, to show a legitimate explanation for termination. Where the employee has demonstrated a *prima facie* case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate clear, specific, and non-discriminatory reason for termination. The employee's duty is to provide evidence, which would permit the Court to conclude the explanation proffered by the employer, is *pretextual*. Pretext can be established by showing that the asserted neutral basis for termination was so riddled with error, that the employer would not honestly have relied on it. The obligation of the employee is not to establish that she has been discriminated against, on strict proof, as demanded by the Respondent in this case; the employee needs only to show that she has a *prima facie* case, and that the reasons advanced by the Respondent, are unworthy of credence. Under our law, specifically Section 5(6) of the Employment Act 2007, the burden rests on the shoulders of the Respondent, to show that discrimination did not take place.

71. This responsibility of proof in discrimination claims is not peculiar to Kenya. It is part of International Labour and Human Rights standards. The ILO Maternity Protection Convention Number 183 [2000] requires that the pregnant employee is guaranteed maternity leave, and the right to return to the same or equivalent job at the end of her leave. Like our domestic legislation, this Convention requires the employer to prove that the dismissal of the employee was not related to pregnancy discrimination, when the employee has laid the basis to show that she suffered the adverse employment decision based on such discrimination. The Universal Declaration of Human Rights proclaims that all men and women are entitled to enjoy their fundamental rights and freedoms, without discrimination. Other International Human Rights Instruments such as the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provide an international legal framework for the realization of the rights of female employees in relation to their reproductive function. Labour standards in this area are aimed at achieving among other objectives, a healthy work-life balance for the mother. The law recognizes that some employers are likely to discriminate against pregnant employees because of prejudices against working women and mothers; employer's fear of loss of productivity during the female employee's absence; employer's insufficient resources to support temporary employees during such absence; and the belief that on return from maternity leave, the female employee will require too many accommodations from the employer, as she engages in baby care. It is not surprising that the Managing Director of the Bank of Africa Kenya Limited was tempted to feel that G M V had become an expensive

employee. The duty to prove that there was no discrimination on account of pregnancy, shifted to the Respondent, once the Claimant established a *prima facie* case.

72. In the US where discrimination jurisprudence is well developed as a result of that Country's race relations, the Supreme Court in the case of **Reeves v. Sanderson Plumbing Products Inc. 530 US. 138, 141 (June 12<sup>th</sup> 2000)** explained the evidentiary threshold as follows:-

*"In appropriate circumstances, the trier of facts can reasonably infer from the falsity of the explanation that the employer is dissembling, to cover up discriminatory purpose. Such inference is consistent with the general principle of evidence law, that the fact finder is entitled to consider a party's dishonesty about a material fact, as affirmative evidence of guilt. Moreover, once an employer's justification has been eliminated, discrimination may well be the most alternative explanation, especially because the employer is in the best position, to put forth the actual reason for its decision.....thus, the Claimant's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee."*

74. The Claimant was a female employee, who at different times during her employment, was blessed with children. She belonged to a class of employees, who are protected by the Employment Act 2007, the Constitution of Kenya, and by certain International Instruments, principally developed by the ILO. There is no dispute she was pregnant in 2009 and 2010. The Human Resource Manager Mary Kariti confirmed the Respondent was aware the Claimant was pregnant in 2010, and was due some days away from the date of termination. It is not in question that she qualified for the job she lost. She had been working for the Bank for 5 years. She holds a Bachelor of Science degree in Finance. The Respondent chose her to manage its specialized facility Agence Elite, catering for premium clients. She would not have been selected to lead premium banking if she did not possess the requisite credentials. The Court does not doubt her credentials as a topnotch Banker. She qualified for the job she lost.

75. Is there *prima facie* case that Vundi suffered adverse action as a result of her pregnancy" The Court is persuaded that the Claimant indeed suffered adverse employment decision as a result of her pregnancy. She lost her job because of her pregnancy. One inescapable observation is that the period of evaluation that resulted in the adverse decision, is the same period she had her first and second pregnancies. Why was not her performance an issue outside her child-giving seasons" Why are there no issues relating to 2006- 2008" Appraisals that the Respondent used in justifying its decision, fall within the 2009-2010 period. Her first pregnancy was in 2009, the second in 2010. The pregnancies heralded her problems with the Bank, after the initial years of a trouble-free banking career.

76. The Claimant gave adequate evidence to show at first instance, that adverse employment decision was made by the Respondent, because of her pregnancies. Was the explanation of the Respondent that termination was grounded on Claimant's poor performance *pretexual*" Is there nexus between the termination decision, and the Claimant's pregnancies"

77. The Claimant testified she was bluntly told by the Managing Director on 3<sup>rd</sup> March 2011, that she had become an expensive employee, and immediately fired. The Respondent contested this evidence, testifying that the Claimant had persistently performed poorly, in the appraisals between 2009 and 2010. Upon careful consideration of the Parties' respective evidence, the Court formed the view that the explanation by the Respondent lacked credence, and was *pretextual*, the actual reason for termination being the Claimant's perceived work unproductivity, resulting from her persistent pregnancies, and pregnancy- induced absence from work.

78. The poor appraisals were timed to coincide with the Claimant's pregnancies. She had worked for five years, but only during the last two years of her service, the years she became for the first and second time pregnant, did the Respondent avail evidence of poor appraisals. The Claimant was transferred to Agence Elite with effect from 19<sup>th</sup> February 2010. The Court finds she was transferred as a Manager to a special Branch. She was to report to the Retail Manager at the Head Office Phyllice Gitumbi. This was the Officer who was supposed to evaluate the Claimant's performance. When the Claimant transferred to the Ngong' Road Branch, which housed the Agence Elite Branch, the Claimant line of reporting was distorted, and she was subjected to appraisal by her peer, Branch Manager Alice Kaaru. There was no document varying the Claimant's contract of employment, to say that she could report to her fellow Branch Manager. The witnesses called by the Respondent were unable to explain in their evidence why the Claimant was evaluated by an employee who was at the same management position as the Claimant.

79. The appraisals were so flawed that they cannot be relied upon to justify the termination of the Claimant's contract of employment. Alice agreed that it would not be objective to appraise the Claimant from January 2010 to March 2010, when the Ngong Branch was not fully operational. The infrastructure was not in place. The Respondent at the same time availed to the Court appraisal forms for the period, showing that Vundi was indeed appraised over the period, by Alice. Alice admitted she was herself recently arrived at Ngong' Road. She was employed in February 2010. Unlike the Claimant who had been serving with the Respondent before moving to the Ngong' Road Branch, Alice came from the outside, having worked for CFC Bank before. She was therefore serving the Respondent under six months' probation, between February 2010 and August 2010 and was singularly unsuitable to appraise any employee during her probation, little less evaluate a fellow Manager overseeing elite banking.

80. There were other glaring flaws with the appraisal system. Alice was not able to say if the target of Kshs. 100 million in deposits growth for the period July 2010 to September 2010 was a target for the quarter or the whole year. The forms did not show distinctively, what the monthly, quarterly or annual targets were. Alice Kaaru testified on cross-examination: "*I cannot recall if it is for the whole year. October to December 2010 states deposits target of Kshs. 100 million. I cannot remember if this is an annual target. The documents do not show quarterly or monthly targets.*" It was left to Phyllice to explain that the deposits growth target of Kshs. 100 million was for the whole year. But even this witness conceded the quarterly targets were not captured in the forms. An employer relying on its own appraisal documents to take adverse action against the employee, must be able to explain its own documents to the trier of facts.

81. Phyllice conceded that even under this flawed appraisal system, the Claimant had asked for training in both years, and Management agreed with the Claimant that there was need for her to be trained. In the period January 2009 to December 2009, Vundi conceded: "*I agree with the appraisal ratings. However, I would like to highlight that I did not get training in line with my role in 2009, which I believe is a necessary tool in building my capacity in the vast field of sales and marketing of bank products.*" Her Supervisor responded: "*as indicated, there is need for capacity building and solutions to be provided through training.*" In the period between July 2010 and September 2010, the Claimant stated: "*it would be good to receive service skills and selling skills to perfect my skills.*" The Supervisor reacted: "*training on selling skills and customer service recommended.*" The Retail Manager testified that she was not aware if the Claimant received the training. The Claimant's performance, even with these constraints, was given the rating of '*met targets or partially met targets.*' The Court has not seen any form where she is marked as "*not met target.*" The Retail Manager recommended on 6<sup>th</sup> January 2011, some few weeks before the Claimant was expected to go on maternity, that: "*Gladys' performance has not been satisfactory, we recommend a replacement for the Elite Unit, so that we can recoup our investment in 2011.*"

82. If the issue was poor performance of elite banking, why not send the Claimant back to her previous role as the Relationship Officer, the role she had performed for the first four years" The letter of termination referred to a second reason for termination, namely that there were complaints by some customers on their requests. There was one letter, written by the Respondent on 26<sup>th</sup> November 2010, some few months before she was to have her second baby, where the Respondent alleged that a Customer Vermont Flowers had complained about poor services from the Claimant. The Claimant stated the Respondent became aware of her second pregnancy around the same time in August/September 2010. The incident took place in 2009, a year before the Claimant was required to explain herself to the Respondent. The Claimant was on leave, when the letter of 26<sup>th</sup> November 2010, demanding she responds to an incident that took place in 2009, was written.

84. The Court is persuaded that the falsity of these explanations by the Respondent in justifying termination, enables the Court to infer that the employer was dissembling to cover up for a discriminatory purpose. It was not by mere chance that poor performance, in a career spanning five years, was coincidental to the Claimant's two pregnancies. It was not by chance that the letter of 26<sup>th</sup> November 2010, alleging customers had complained against the Claimant, was authored upon the Respondent discovering that the Claimant was on her second pregnancy. These were *pretextual* termination of employment reasons. Once the employer's justification has been eliminated, discrimination is most likely to be the alternative explanation. The Claimant's *prima facie* case, combined with the Respondent's limping asserted justification, is sufficient to permit this Court as a trier of facts, to conclude that Vundi was unlawfully discriminated against by the Bank of Africa Kenya limited, on account of her pregnancies. She was deemed to be an expensive employee.

85. The Respondent did not even give the Claimant an opportunity to defend herself, before a formal disciplinary panel. The process of termination lacked in procedural fairness, as much as it did, on substantive justification. Under Clause 10.9 (26) of the Respondent Human Resource Staff Handbook, allegations of staff incompetence or inefficiency in the performance of prescribed normal duties merited first warning and second warning, before dismissal. The Respondent alleged the appraisals showed the Claimant was not meeting her targets. The second allegation was that there were complaints against her from customers, about poor service. These two allegations fall under Clause 10.9 (26). They are about an employee's incompetence and inefficiency. There was common evidence from the Parties that the Claimant was not issued with any warning prior to termination. Clause 10.11 requires the Human Resources Committee gives the concerned employee a right of hearing. There was no Human Resources Committee convened at any time, where charges were laid out against the Claimant, and explanation sought, in terms of Clause 10.11. This Clause adopts the statutory minimum disciplinary procedure prescribed under section 41 of the Employment Act 2007 on the right of hearing. Even assuming the appraisal system was beyond reproach, and assuming there were complaints by customers against the Claimant about poor service, the Respondent would still have the obligation to show to the Court that the Respondent heard the Claimant on these accusations, in terms of Sections 41 and 45 of the Employment Act.

86. It is not correct that because the Claimant's initial contract of employment allowed Parties to terminate the contract of employment by notice, or pay in lieu of notice, that the Respondent had no obligation to give valid reason or reasons for termination, and observe procedural fairness. The Parties' contract required the Claimant be heard, and be given valid reason or reasons before termination. The requirements of Section 41, 43 and 45 of the Employment Act 2007 are minimum employment standards, which must be read into all contracts of employment. Any contract that does not conform to these standards is invalid to the extent of its inconsistency. The Human Resource Staff Handbook provided for hearing before termination. The Court has in the past explained that employment is no longer at the will of the employer, where the employer can fire the employee for any reason, or no

reason at all. The innovative argument by the Respondent that the notice provided for in the contract of employment was on its own, sufficient reason for termination, is a position that cannot be sustained. If notice or notice pay sufficed, then the entire employment protections given under the Employment Act 2007 would not make any sense, and employers and employees would have reverted to the bygone era, when the doctrine of employment –at –will was predominant. These employment protections have instead, been dug-in under Article 41 of the Constitution, which demands that the employment relationship is founded on fair labour practices.

87. The Claimant seeks various prayers under the Constitution, the Employment Act and the Contract of Employment. The Respondent stated without much conviction that the Court does not have jurisdiction to grant the remedies sought. In the initial Statement of Reply, the jurisdictional challenge was that, only the High Court has the authority to grant the declarations sought by the Claimant under Article 23 of the Constitution. The Court would be exceeding its mandate under the Labour Institutions Act 2007, whose Part 3 was in force at the time this Claim was filed, by granting these declarations. It is now settled that the Industrial Court has the mandate to interpret, enforce and promote Constitutional Rights that fall within the labour and employment regime. This has been established by the High Court itself, in the **High Court Petition Number 170 of 2012 between United States International University [USIU] v. the Attorney General of Kenya & 2 Others [2012 e-KLR]**. Justice Majanja held that the jurisdiction of the High Court is not established by Article 23, but by Article 165. The Industrial Court is created by Article 165 [2], and the High Court is prohibited by Article 165 [6] from supervising the Industrial Court. This challenge by the Respondent appears to have been abandoned in the closing arguments. The Respondent instead argued that the Claimant had not exhausted her right of appeal under the Human Resource Staff Handbook, and secondly, that even if the Industrial Court concluded it has the jurisdiction, the damages claimed on account of pregnancy discrimination at Kshs. 3 million is grossly exaggerated. The Court has no doubt that it is conferred jurisdiction by the Constitution and by Acts of Parliament, to hear and determine the dispute and grant remedies. The Constitution, Employment Act 2007, the Industrial Court Act 2011 and the repealed Part 3 of the Labour Institutions Act, grant/ granted the Court exclusive jurisdiction to redress pregnancy discrimination.

88. There is nonetheless a recurrent question on the range of remedies the Court should grant to the likes of the Claimant, in disputes where Contractual, Statutory and Constitutional issues are implicated, from the same employment wrong. The Claimant has prayed for damages of Kshs. 3 million against the Respondent for violation of her right not to be discriminated against under the Constitution, and also prayed for compensation under the Statute at twelve months' salary, calculated at Kshs. 2,184,000. She claims further remedies in the form of Contractual losses, actual and anticipatory. The Respondent submits that should the Court find the Claimant's Constitutional Rights to have been violated, it should grant no more than Kshs. 500,000 in damages, which is the popular limit imposed by the High Court of Kenya, on violations of this nature. The High Court case of **Fredrick Kimani v. the Attorney General (2012) e-KLR** was given in persuading the Industrial Court to grant minimal damages. Under the Employment Act 2007, the Respondent asked the Court to give no more than three months' salary in compensation, should there be a finding of wrongdoing on the part of the Respondent.

89. This Court does not encourage employees to claim multiple remedies arising from the same wrongdoing on the part of the employer, whether these violations are claimed to infringe the Constitution, the Statute or the Contract. In the **Industrial Court Cause Number 379 [N] of 2009 between D.K.Njagi Marete v. Teachers Service Commission (2013) e-KLR**, this Court emphasized the need for proportionality and fairness in evaluating the suitability of employment remedies. The demands of social justice must be weighed carefully, against the needs of economic development. Ultimately, the purpose of compensatory awards is not to punish errant employers, however egregious their decisions against their employees be; the objective is to ensure economic injury suffered by the employee, is adequately



redressed. The Court does not encourage multiplication of remedies claimable by employees, arising out of the same cause of action, but in which different legal regimes are invoked to justify different remedies.

90. Violations of Constitutional Rights may nonetheless be different, and more serious than the violation of Statutory or Contractual Rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract disparate remedies. The Contract of Employment is the main port of entry. The terms and conditions of employment in the Contract, govern the employment relationship, except to the extent that the terms are contrary to the law, or have been superseded by the Statute or by a Collective Bargaining Agreement. Our statutory law has been influenced largely by the ILO Conventions, and aims at correcting the failures of the common law. The challenge of the Industrial Court lies in the examining of labour rights, within the context of the Constitution of Kenya and International Labour Law. Some scholars see this challenge as one where the Court is called upon to harmonize Common Law with the Bill of Rights.

91. The High Court of Kenya, Constitutional Division, has severally stated that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the Constitutional Right. This position has been approved by the ***Constitutional Court of South Africa in the case of SA Naptosa & Others v. Minister of Education Western Cape & Others [2001] BCLR 338, at 395***. The Court stated:

*"If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the Act, the Act might come under scrutiny, for not giving adequate protection to a constitutional right."*

92. The Employment Act under Section 5[3] outlaws discrimination on the basis of pregnancy. Section 46 makes termination on the basis of a female employee's pregnancy, or any reason connected with her pregnancy, an automatically unfair decision. Remedies for such discrimination, under the Employment Act 2007, are to be found in Section 49 of the Employment Act 2007, which grants *inter alia*, compensation equivalent to a number of months' salary, not exceeding 12 months, based on the gross monthly salary at the time of dismissal. Is a ceiling of twelve months' salary sufficient to redress the discrimination suffered by the Claimant, or should the Court extend this limit, invoking the remedial jurisdiction under the Constitution"

94. Contractual damages under the Labour Institutions Act, and now the Industrial Court Act, had/ have no *a priori* limits. There are no such limits under the Constitution of Kenya. The position by the Respondent that this Court adopts general damages of Kshs. 500,000, as normally given at the High Court, has no merit. There is nothing in our law books that abrogates an employee's right to enforce rights conferred by the contract at common law, or those enjoyed by virtue of the Constitution. In the view of this Court, while employees must not be encouraged to multiply remedies from the same injuries, the Industrial Court must not be limited by the twelve months' gross salary set under the Employment Act 2007, in assessing compensatory damages. The Industrial Court Act 2011 frees the Court in assessing the size of compensatory damages in employment claims, as does the Constitution of Kenya.

95. Historically, caps on compensatory awards have existed within specialized Employment Dispute Resolution Mechanisms, so that these Tribunals do not veer into assessing damages in employment claims, following the influences from personal injury claims. It is argued that without statutory caps, there would be no need to have these specialized dispute resolution mechanisms; employees would just move

to the Civil Courts, and damages awarded in the mode of personal injury claims. Capping of the awards of the Industrial Court under the Trade Disputes Act Cap 234, which was carried over to the Employment Act 2007 and the Labour Institutions Act 2007 borrowed from the English Employment Tribunal System. Claims in this Tribunal for unfair termination had monetary limit, while contractual claims filed in the Civil Courts had no limitation *a priori*.

96. The ***House of Lords in the cases of Eastwood & Another v. Magnox Electric PLC; McCabe v. Cornwall County Council & Others [2004] UKHL 35***, explained the capping as follows:

*“ in fixing these limits on the amount of compensatory awards, parliament expressed its view on how the interests of employers and employees, and social economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the Courts to extend further, a common law implied term, when this would depart significantly, from the balance set by legislature. To treat the statute as prescribing the floor, and not a ceiling, would do just that..... it would be inconsistent with the purpose parliament sought to achieve, by imposing limits on compensatory awards payable in respect of unfair dismissal.”*

The Employment Tribunal in England, like out Industrial Court under the Trade Disputes Act, however, had the authority to grant the remedies of reinstatement or re-engagement, as alternatives to compensation. This was an authority not enjoyed by the Civil Courts. The capping therefore took into consideration the additional powers of the Employment Tribunals to grant alternative remedies, which jurisdiction was not enjoyed by the Civil Courts.

97. The Industrial Court of Kenya has developed from the concept of an Industrial Tribunal, to a Superior Court of Record, enjoying all the powers previously enjoyed by the Industrial Court under the old regime, combined with the new wide ranging Constitutional mandate. The Court is being called upon to define the interface between the Constitution, the Labour and Employment Legislation, and the Contract of Employment. Labour Law Scholars such as ***Darcy du Toit from the University of Western Cape in her paper titled ‘Oil on Troubled Waters- The Slippery Interface between the contract of employment and the statutory labour law,’*** have argued that the Industrial Court, must shift its mind from linear approach to polycentric socio-economic approach, noting that labour and employment rights, fall under the broad socio-economic rights. If the Industrial Court does not exercise such a mind shift and is stuck on the mentality of capping, set under the old Trade Disputes Resolution System, the objectives and purposes of the Constitution of Kenya would be defeated.

98. While exercising caution, not to appear to be punitive on the wrongdoing employers, the Industrial Court must not be limited by the capping of compensatory awards fixed at a maximum of twelve months. A pregnancy discrimination claim cannot be adequately redressed through the remedy of compensation granted under the Employment Act 2007. There are far too many basic rights that are infringed, whenever an employer discriminates against an employee, on the basis of pregnancy, which calls upon the Industrial Court to move beyond the remedy of twelve months’ gross salary in compensation. The Claimant’s right to have equal opportunity in economic and social sphere was violated; she obviously suffered discrimination on the ground of pregnancy; she was denied fair labour practices; and was deprived of her right of inherent dignity. Pregnancy is an important component of the basic right of all persons to have a family under Article 45, and to the extent that the family is the natural and fundamental unit of the society, and the necessary basis of social order, an employment decision that denigrates pregnancy, is an assault on the society as a whole.

99. The Court does not think however, that violation of every conceivable Contractual, Statutory and Constitutional right, deserves a separate award of damages. It is not necessary for the Court to go

through every violation, and make a determination for each of the series of violations. It does not add value to the decision of the Court, to make serial declarations as sought by the Claimant. The claim that the Respondent is ordered to direct the Administrator and Trustees of the Claimant's Pension Scheme to release the Claimant's pension seems to this Court to be an action that should be pursued against the Pension Scheme Trustees, who are not party to the proceedings, and who have separate legal personality from the Respondent. The Claimant did not show to the Court that she applied for maternity leave, and was denied that leave by the Respondent. The claim for loss of three months of maternity entitlement is not well grounded in fact or law. There was no explanation why three weeks before her baby was due, she was still at work and why she would wait until termination to claim her maternity entitlement. This prayer is rejected. The claim for loss of medical benefits associated with child birth incurred to-date, was not given adequate proof by the Claimant. This default of evidence similarly applied to the claim for future loss of medical benefits to the Claimant and her two children over twelve months. The Claimant did not persuade the Court in her testimony, why these medical benefits should be paid, or how she arrived at the given figures claimed. The claim for loss of subsidized interest on the mortgage has been withdrawn by the Claimant, and nothing turns on this claim. The Court is satisfied that there is sufficient legal and factual grounds to grant a broad declaratory remedy; damages; salary in lieu of notice; service/gratuity pay; days worked up to 3<sup>rd</sup> March 2011; and outstanding leave days. The Respondent offered 12.5 outstanding leave days at Kshs. 75,833, 3 days' salary at Kshs. 17,613, and 3 months' salary in lieu of notice at Kshs. 546,000. In consideration of the five years the Claimant served, the Respondent offered Kshs. 833,560. In total, the Respondent offered to the Claimant a sum of Kshs. 1,473,006. These sums are granted to the Claimant as offered in the letter of termination. The Court does not take away from an employee, what has been given by the employer.

100. Against this background the Court finds in favour of the Claimant, and makes the following Orders:-

***(a) It is declared that the Claimant's termination of service by the Respondent was based on her pregnancy, and therefore discriminatory, unfair, unlawful, and in violation of the Employment Act 2007, the Contract of Employment, and the Constitution of Kenya;***

***(b) The Respondent shall pay to the Claimant coalesced damages at Kshs. 3,000,000;***

***(c) The Respondent shall pay to the Claimant salary in lieu of notice; service/gratuity pay; outstanding leave; and 3 days worked in March 2011 at Kshs. 1,473,006;***

***(d) The Respondent shall pay to the Claimant a total of Kshs. 4,473,006;***

***(f) Costs to the Claimant; and,***

***(g) Interest on the principal sum and on costs, granted to the Claimant at 14% per annum from the date of the delivery of this Award, to the date payment is made in full.***

The Court takes the opportunity to thank Mr. Obura and Mr. Ogunde for their tremendous assistance to the Court in arriving at this decision.

Dated and delivered at Nairobi this **31<sup>st</sup>** \_ day of **July** 2013

James Rika

Judge



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