

Discrimination at the work place on the basis of gender, pregnancy and HIV status

Claimant: VMK

Respondent: Catholic University of Eastern Africa (CUEA)

Industrial Court of Kenya in Nairobi

Cause no. 1161 of 2010

Judgment delivered by Justice Mathews N. Nduma on 8 November 2013

The Kenyan Constitution (2010) is the starting point for the creation, promotion and protection of fundamental freedoms of the citizens.

Below we discuss the development of the right to equality and non-discrimination through case law in the case of VMK v Catholic University of Eastern Africa (CUEA). This summary will provide activists and civil society members with a practical understanding of the case law.

The facts of the case are that the Claimant had been an employee of the Respondent since the year 2000 when she joined as a casual employee in the position of a telephone operator and was earning Kshs. 7000 as basic pay without benefits. There were two male employees in the same position employed on permanent and pensionable terms. In 2003, the Claimant responded to an internal job advertisement, was shortlisted, interviewed and was recommended for appointment and invited to discuss the new terms of service but her hopes were quickly dashed when the Respondent received the results of an HIV test, done without the knowledge, consent or authority of the Claimant. The test was done as a pre-requisite for taking up the job and HIV was not among the tests that was to be conducted based on the Medical Examination form which she was given by the Personnel department. The Claimant was not counseled prior to the disclosure of the results to her, and the Respondent went ahead to share the results with her colleagues and superiors in the Human Resource Department. The Claimant continued to work for the Respondent until 28th September, 2007 when she was offered a one year contract earning Kshs. 26,171 without benefits. The Respondent kept her on short and progressively shorter contracts with unequal terms due her HIV status; refusing her paid maternity leave followed by an immediate termination of employment upon return from the unpaid maternity leave.

On the 8th November, 2013, the court delivered its judgment in the matter. This is the first judgment to clearly discuss international conventions, case law and the Constitution with relation to discrimination based on ones HIV status at the work place. The judgement is an important advancement in the law that is in line with the provisions and values of the Constitution.

The issues for determination in the matter can be summarized as follows:

1. Whether the Claimant was discriminated against and denied fair and equal employment terms and conditions on the basis of gender by denying her permanent and pensionable employment terms as enjoyed by her two male counterparts in the same position.
2. Whether the Claimant was discriminated against, denied fair and equal employment terms and conditions and terminated from her employment due to her HIV status.
3. Whether the Claimant was discriminated against on the basis of pregnancy by denying her paid maternity leave contrary to express provision of Section 29 (1) of Employment Act.

The court noted in its judgement that the claimant offered compelling evidence which was adduced courageously. She was forthright, clear and candid in her testimony. The respondent however offered little evidence to refute the evidence by the claimant.

The proceedings were done in open court though in the afternoons when no other matters were fixed for hearing and that provided a reasonable measure of confidentiality.

The court in coming up with its judgement considered the following:

1. The Constitution of Kenya (2010)

Article 28 of the Constitution provides that each person has inherent dignity and that dignity should be respected and protected. Article 27 provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. Article 41 targets the work place and provides

that every person has the right to fair labour practices including the right to fair remuneration and reasonable working conditions.

2. International Labour Standards

Article 2 (5) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the Laws of Kenya.

The court took into account provisions of the International Labour Organization convention No. 100 (convention concerning equal remuneration for men and women workers for work of equal value (1951) which at Article 1(6) provides for equal remuneration for workers without discrimination based on sex.

Article 1 of the Convention concerning discrimination in respect of employment and occupation (1958) defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion , political opinion , national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Further, the HIV and AIDS recommendation, 2010 (No. 200) talks against discrimination against or stigmatization of workers on the grounds of real or perceived HIV status and it further provides that no workers should be required to undertake a HIV test or disclose their HIV status.

3. The Employment Act (2007)

The Court referred to Section 5 (3) (9) of the Employment Act which expressly provides;

“No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee

a) On grounds ofsex...pregnancy...or HIV status”

4. Case Law

The Court relied on several case laws from different jurisdictions to point out the issue of equality and non- discrimination. Some of the cases relied on are:

- i. *Petition No. 1856 of 2002 X of Mumbai India Inhabitant – Petitioner vs. State Bank of India* where the court held that the petitioner could not be denied opportunity of employment on the basis of his HIV status.
- ii. *Gary Shane Allpass vs. Moikloof Estate (Pty) Limited t/a Moikloof Equistran Centre the Labour Court of South Africa in Johannesburg Case No. JS1 178/09* the court at page 192 paragraph 14 held that denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination.

Finally, the court made a determination as follows:

1. It is important to note that the initial discrimination here appears to have been for no other reason but that the Claimant was a woman and was targeted to be employed on unequal terms for equal work. It is the court's finding that the Claimant was remunerated differently for equal work for a period of seven (7) years.
2. It is this Court's considered view that an employee or prospective employee may not be medically unfit merely by virtue of having been infected by HIV. The Respondent:
 - i. Grossly erred in refusing the Claimant herein employment on a permanent basis on the basis of her HIV status.
 - ii. Grossly breached the Claimants right to employment and equal treatment by subjecting her continuously to casual employment and inferior remuneration purely on the basis of her HIV status.
3. Having found the Respondent unlawfully withheld the salary for the Claimant whilst she was on maternity leave, the court was persuaded to find the Respondent violated the express provision of Section 29 of the Employment Act, 2007 which provides that a female employee is entitled to three months maternity leave with full pay and on expiry of the leave she has the right to return to the job which she held immediately prior to the maternity leave.
4. The cumulative effect of these actions against the Claimant constitute gross affront on her human dignity contrary to Article 28 of the Constitution: a gross violation of her right to fair labour practices which include a right to fair remuneration and to reasonable working conditions contrary to Section 41 of the

Constitution. The conduct of the Respondent grossly violated Article 27 of the Constitution and in particular her right to equal benefit of the law and equal enjoyment of all rights was grossly violated by the discriminative conduct of the Respondent in spite of specific provisions of the Labour laws that guaranteed the claimant's specific rights and equality at the workplace.

5. An award of exemplary damages was appropriate in the circumstances of the case. The Court acknowledged the courage of the Claimant and her sense of dignity inspite of gross violations of her human dignity at the hands of the Respondent for a period of about seven years.
6. Having found that the termination of the employment of the Claimant was a culmination of various discriminatory actions against the Claimant which was unlawful and in violation of human rights of the Claimant, the court found that the termination did not meet the threshold provided under Section 45 (2) (a) and (c).

The Claimant was awarded Kshs. 6,971,346/= approximately USD 83,000