

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 157 OF 2018

STEPHEN MAINA GITHAIGA.....CLAIMANT

VERSUS

ACK DIOCESE OF MOUNT KENYA WEST REGISTERED

TRUSTEES.....1ST RESPONDENT

BISHOP JOSEPH MWANGI KAGUNDA....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents and averred that he was employed by the 1st Respondent as a lorry turn boy at first from February 2013 to 30th September and thereafter as a lorry driver from October 2014 where he worked diligently till 30th November 2017 when he was unlawfully/wrongfully terminated. He averred that the 2nd Respondent was the appointing officer and Bishop of Nyeri ACK Diocese of Mt Kenya West. The Claimant averred that at the time of termination the Respondents were still indebted to him in the sum of Kshs. 538,855/- made up as compensation for unlawful termination – Kshs. 193,233/-, underpaid wages – Kshs. 238,849/-, unpaid leave for each completed year – Kshs. 42,648/- and unpaid house allowance – Kshs. 64,125/-. He also sought the costs and interest on the suit at court rates.

2. The 2nd Respondent's defence was to the effect that he was not the Claimant's employer and that he himself was an employee of the 1st Respondent. He averred that he was not the appointing officer of the Claimant and that he has no mandate to hire or terminate the services of any employees of the Diocese and that he was a stranger to the averments by the Claimant. He averred that the claim raised no reasonable cause of action against the Claimant and that the suit against him was not meritorious. He averred that the Claimant's pleadings show that his employer was the 1st Respondent as evidenced by the payslips attached to his claim. He thus sought the dismissal of the Claimant's claim against him with costs. In an amended defence, the 2nd Respondent averred that the Claimant in a demand at the Labour and Social Protection Department he sought payment of leave days not taken and was paid a sum of Kshs. 42,750/- being pay for leave not taken for 3 years – Kshs. 27,000/- plus Kshs. 15,750/- as severance pay for 3 years of service. The 2nd Respondent thus urged the dismissal of the claim with costs.

3. The 1st Respondent seemingly did not file any defence. The Claimant testified as did Gerald Mwangi Mureithi the administrative secretary of the 1st Respondent. The Claimant testified that he was employed as a turn boy and was later promoted to a driver. He stated that he used to report to the office of the 2nd Respondent. He stated that he was not given any notice at the time of his dismissal and no hearing was conducted before his dismissal. He stated that he received a deposit from the Respondents and he did not know what was paid. He testified that he did not sign for the deposit received. He stated that the severance pay and the pay in lieu of notice were paid and that he earned Kshs. 9,500/-. He testified that he went to the Labour Office seeking assistance to recover his dues and the issue was not resolved at Labour and the money was paid later. In re-examination he stated that he was employed by the 2nd Respondent himself and that the 2nd Respondent was the administrator. He testified that the Bishop is the one who terminated his contract and the claim was different from what was received as he received about Kshs. 27,000/- or so. He stated that no allowances were paid.

4. The Respondents' witness testified that he was the administrative secretary of the ACK Diocese of Mt. Kenya West. He stated that there was a committee that employs staff. He referred to the exhibits and stated that there was a payment voucher which indicates payment. He testified that the 1st Respondent paid one month in lieu of notice and because the Claimant had a loan with ACK Staff SACCO he was paid less. He stated that they received a complaint from the Labour Office and the issue was resolved and the Claimant was paid the 3 years leave of Kshs. 28,500/-, severance pay of Kshs. 14,250/- and that the other sums had already been paid. He stated that the Claimant agreed he had no other claims on termination. In cross-examination he testified that transactions at the Diocese are through him and that he was the one in charge of the Claimant. He stated that he was not the Claimant's employer and that once an application was received it would go through the vetting committee and interviews conducted. He testified that he was in the committee that decides who to employ or dismiss. He stated the Claimant was employed as a driver and was paid a gross salary of Kshs. 9,500/- and that on daily basis he was paid Kshs. 400/-. He stated that the Claimant was given a house and that the Claimant was called not on a disciplinary issue but because it was the end of his contract. He testified that the money deposited was payment in lieu of notice, severance pay and leave allowance. He stated that the Claimant accepted the payment and signed at the Labour Office. He stated that he had not filed the document used to make payment to the Claimant. He believed that what was paid to the Claimant was sufficient. In re-exam he stated that the Claimant lived in the church house and they paid the electricity and water bill for him. He testified that they did not require authority to pay the Claimant and that the Claimant was paid what was agreed. He stated that the contract had ended and the Claimant had accepted Kshs. 9,500/- plus those other benefits. That marked the end of oral testimony and the parties were to file submissions.

5. The Claimant submitted that the 2nd Respondent who was the administrator called and dismissed him without notice. He submitted that he

was employed by the 1st Respondent but it was the 2nd Respondent who had dismissed him as he was the one in charge. He submitted that he never got his dues though money was deposited in his account 3 times. He submitted that he had not signed any voucher to collect any money from the Respondents. The Claimant submitted that the issue for determination was whether he was fairly/lawfully terminated by the Respondent. He submitted that prior to his termination no notice was issued before his dismissal and there was no payment in lieu of notice. The Claimant submitted that he was not called to any meeting prior to his dismissal and that on the strength of Section 43 of the Employment Act the employer was required to prove the reasons for the termination and if the employer fails to do so the termination is deemed to have been unfair within the meaning of Section 45. He cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** which established the test for fairness. He submitted that the reason leading to his termination failed to meet the fairness test. The Claimant submitted that the Respondents violated Section 41, 43, 44 and 45 of the Employment Act. He relied on the case of **Ignas Karingo Mghona & 4 Others v Star of Hope International Foundation [2016] eKLR** where Rika J. held while considering that the employees of the organisation had consented to the pay they were receiving, they were entitled to the basic minimum pay provided for under the Labour Institutions Act. The Claimant submitted that some money was deposited in his account without his consent and that these actions were in a bid to avert paying the Claimant what is legally owed to him. The Claimant submitted that having not entered appearance judgment be entered against the 1st Respondent as prayed.

6. The 2nd Respondent's submissions were that the Claimant had admitted in his claim that the 2nd Respondent was not his employer which he confirmed during cross-examination. The 2nd Respondent submitted that the Claimant admitted receiving monies in his account which were payment for one month in lieu of notice, leave allowance for 3 years and severance pay totalling Kshs. 51,310/-. The 2nd Respondent submitted that there is no entity under the Anglican Church like the Mt. Kenya West Registered Trustees sued as the 1st Respondent in the claim herein. The 2nd Respondent thus sought the dismissal of the Claimant's suit with costs.

7. The Claimant's case was that he was underpaid and that he was not notified of the dismissal by the Respondents. He sued ACK Diocese of Mt. Kenya West Registered Trustees as the 1st Respondent and Bishop Joseph Mwangi Kagunda as the 2nd Respondent. He was a driver after serving as turnboy. It was apparent from pleadings and testimony that the 2nd Respondent knew the Claimant but was not his employer. The Claimant at paragraph 4 of the claim averred that he was employed by the 1st Respondent as a lorry turn boy at first from February 2103 up to 30th September and thereafter as a driver from October 2014. He averred his exit salary was Kshs. 9,500/-. He submitted as part of his evidence the Regulation of Wages (Amendment) Order 2015 which indicated the salary of a driver in all former municipalities and town councils of Mavoko, Ruiru and Limuru to be Kshs. 16,102.75 a month. He proved underpayment but he sued the wrong entity as there is no legal entity known as ACK Diocese of Mt. Kenya West Registered Trustees and if there is one the Claimant did not show what nexus he has with it as no contract of employment was exhibited. He was paid some money and he was disingenuous to assert he was not paid yet he received deposits 3 times from ACK Diocese of Mt. Kenya West his employer. As the suit against the 1st Respondent was a non-starter having been instituted against an entity that was not the Claimant's employer the suit against the 1st Respondent is dismissed albeit with no order as to costs. The 2nd Respondent was not the Claimant's employer and he was improperly joined. There being no cause of action against him the Claimant's suit against the 2nd Respondent is dismissed with costs to the 2nd Respondent.

It is so ordered.

Dated and delivered at Nyeri this 4th day of February 2020

Nzioki wa Makau

JUDGE