



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 11 OF 2005

ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

JOSEPHAT GITONGA KABUGI.....DEFENDANT

JUDGMENT

1. This suit is a claim by an employer against its former employee for a sum of Kshs.4,313,985.20.
2. Archdiocese of Nairobi Kenya Registered Trustees (the Plaintiff) is a body corporate registered under the provisions of the Trustees (Perpetual) Succession Act. It runs and sponsors a school known as St Mary's School (the School). At all material times to the suit Josephat Gitonga Kabugi (Kabugi or the Defendant) was a Financial Controller at the School.
3. In the Plaint presented on 10th January 2005, the Plaintiff states that, on diverse dates between the years 2000 and 2002, Kabugi illegally, fraudulently and without authority converted Kshs.3,276,521.25 to his own use. Further, that the Defendant caused Jet Travel Limited to invoice the school for Kshs.52,100.00 on account of tickets not authorized by the school and which the school paid.
4. Another claim is for the sum of Kshs.650,000.00 being an unpaid loan granted to Kabugi by the school and Kshs.335,364.00 being an unauthorized loan granted by Kabugi to himself from school funds.
5. Kabugi denies the claim and launches a counterclaim. He denies any wrongdoing and alleges that audits carried out on 11th and 31st July 2002 were not balanced as he was never requested to explain the transactions which were the subject matter of the audit. That at the time, he had been suspended and not allowed back into his office.
6. As regards the loan of Kshs.650,000.00, Kabugi admits it but states that he will repay it once the matters that comprise this dispute are fully settled. As for the other alleged loan of Kshs.335,364.00, the Defendant denies it entirely.
7. On the issue of air tickets, Kabugi states that the booking was cancelled and so if the school made payment to Jet Travel Limited then he cannot be held responsible.
8. By way of counterclaim, Kabugi avers that his summary dismissal of 12th July 2002 was without notice and without lawful cause. Further, that it was in breach of the contract of employment entered between himself and His Grace the Archbishop of Nairobi on behalf of the Plaintiff.
9. Kabugi contends that his contract of employment was peculiar and he highlights the alleged peculiarity. First that he was employed as a Financial Controller by His Grace for and on behalf of the school. His employment contract was oral. That while it provided for a monthly salary of Kshs.191,020.00 as at 2002, a portion of Kshs.70,000.00 was held back in a salary retention arrangement for purposes of saving on tax. That his employment was only terminable by either party serving the other a 6 months notice or by payment of 6 months salary in lieu of notice, and even then only by His Grace the Archbishop of Nairobi.
10. Kabugi contends that he suffered loss and damage as a result of the unlawful termination, the particulars of which are:-

a) *Unpaid salary arrears with effect from 19th January, 2000 and June 2002*
Kshs.1,738,120.00

b) Unpaid salary with effect from June 2002 – May 2004	Kshs.4,584,480.00
c) 6 months pay in lieu of notice	Kshs.1,146,120.00
d) Interest due on provident fund	Kshs.300,000.00
Total	Kshs.7,768,720.00

The Defendant claims that amount and seeks further prayers.

11. In the Counterclaim of 22nd January 2002, he seeks a Declaration that the allegations of the Plaintiff are untrue and that he is entitled to a clean letter of recommendation from the School. He also seeks a declaration that the School Principal, not being privy to the employment contract, had no locus or power to terminate it. He prays for General Damages for breach of contract as well as exemplary or aggravated damages. He also seeks costs and interest.

12. At the hearing, six witnesses testified. Four on behalf of the Plaintiff, the Defendant himself, and a joint witness. Their evidence is discussed as they relate to the issues for determination. In their closing submissions each side gave proposals as to what they considered arose for determination. Looking at those proposals and the pleadings, I think the following the issues for determination.

- i. Did the Defendant unlawfully convert the Plaintiff's funds without knowledge and authority of the Plaintiff?
- ii. If so, what amount was lost by the Plaintiff?
- iii. Did the Plaintiff unlawfully terminate the Defendant's contract?
- iv. If so, what loss has been proved by the Plaintiff?
- v. What is the appropriate order as to Costs?

13. There was common evidence that at the behest of Archbishop Ndingi Mwana A'Nzeki (PW1), the Defendant was employed by the School. Neither of the parties produced a written contract in that regard and it is fair to say that the contract was oral. Emerging from the evidence is that the disclosed salary of the Defendant was a gross pay of Kshs.70,000.00 (See various pay slips (D. Exhibit 3 Pages 21-27). In some months, the Defendant would also be paid a house allowance of Kshs.13,500.00 (See for example, the pay slip for May 1999 (D. Exhibit 4).

14. It was the evidence of Kabugi that as at 2002, his salary was actually Kshs.191,020.00 and Kshs.70,000.00 was retained in the salary retention account for tax saving purposes. This is what he said as to the legality of the arrangement.

“When I looked at it, I noted it was not 100% legal because it had not been registered with the government like a provident. We started instituting the process of registration.”

15. He further stated;

“For as long as the money was paid, there was an element of illegality. I was aware about this illegality. I brought the issue of the illegality to the board. I went along with the scheme”

16. It has to be remembered that the Defendant was a Financial Controller of the School and an accountant by profession and confesses that the arrangement was not legal. The doctrine of *Ex turpi causa non oritur action* would not allow either the School nor the Defendant to benefit from that illegal scheme.

17. The School complains of losing money on diverse dates between the years 2000 and 2002. A sum of Kshs.3,376,521.25 said to be money given to the Defendant by Joseph Kiarie Mungai (PW2), the School accountant, but not accounted for.

18. The testimony of the witness was that the Defendant or his secretary Carol Nderitu would collect the cash personally or send different members of staff to collect it on his behalf. He stated that the expectation would be that Kabugi should account for the money he took but that he did not do so. In support of this the Plaintiff produced a bundle of petty cash vouchers and other notes (See the Plaintiff's supplementary Bundle of Documents).

19. Naomi Gitari (PW 3) and David Kibe (PW 4) are two amongst other staff members who are said to have been sent by Kabugi to collect money from Mungai. They gave evidence in support of Mungai's testimony.

20. Naomi Gitari's testimony was that she would collect money on behalf of Kabugi and she would either sign for it and take it to Kabugi who would also later sign for it. She gave the following as monies collected by her on behalf of Kabugi:-

See the Plaintiff's list of documents

Page	Voucher No.	Date	Amount (Kshs.)
5	5	4-9-2000	10,000/=
8	8	4-10-2000	10,000/=
78	8	4-10-2000	10,000/=
102	52	20-3-2001	15,000/=
127	96	15-10-2001	55,000/=
131	104	12-11-2001	20,908/=
141	127	12-4-2002	10,000/=

The Plaintiff's Supplementary Bundle of Documents

Page	Voucher No.	Date	Amount (Kshs.)
56	52	20-3-2001	15,000/=

21. David Kibe gave similar evidence and this is what he states in his written statement:-

“These personal uses included his electricity bills, Multi-choice bills, telephone bills, some money for example Kshs.48,000 to take to the wife for house rent and Kshs.57,150 for air tickets.

See the Plaintiff's list of documents

Page	Voucher No.	Date	Amount (Kshs.)
96	42	20-2-2001	20,000/=
98	45	1-3-2001	100,000/=
99	46 (Telephone)	7-3-2001	1,731/=
101	50	15-3-2001	10,000/=
113	73	26-7-2001	5,000/=
116	78	7-9-2001	2,000/=
120	86 (Tickets)	8-11-2001	57,150/=
126	95 (Multi choice)	9-10-2001	4,000/=
128	97	18-10-2001	8,200/=
132	108	21-12-2001	11,400/=
133	109	14-1-2002	7,000/=
134	112 (Rent)	19-12-2002	48,000/=

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The Plaintiff's Supplementary Bundle of Documents

Page	Voucher No.	Date	Amount (Kshs.)
131	94	6-10-2001	12,000/=
161	111	7-11-2002	1,290/=

22. Naomi Gitari was not cross-examined at all by the Defendant's counsel. While the few questions posed to David Kibe did not challenge that he collected money for Kabugi. In regard to Mungai, he was fairly steady in his testimony and this Court does not have reason not to believe him.

23. I would also add that this Court got a distinct impression that the Defendant does not deny receiving the sum of Kshs.3,276,521.25 but then explains as follows:-

"I deny ever misappropriating even one single cent as all School financial transactions were fully documented. Unfortunately most of the documents which would assist to set the record straight were left locked in my office upon my suspension and without an order of Court the same will never be reached. The allegation of misappropriation of funds made against me are totally false and baseless."

24. Along the same lines Kabugi stated as follows in Court:-

"If all the records, including mine were availed, all discrepancies would be explained."

25. There is no doubt that Kabugi was asked to leave in haste and was unable to access his office thereafter. Indeed, one David Maina (PW5) (the joint witness) who carried out a special audit in respect to the alleged losses, did not interview Kabugi. That in fact his seniors told him not to talk to Kabugi as he was the main suspect. He thought this to be absurd.

26. There is an interim audit report dated 18th June 2002 by the witness. In the report the witness, partly, says:-

"It must be understood that without proper and reliable accounts being drawn up, incomplete and inconclusive observations and conclusions will be drawn."

The witness indeed stated that he refused to sign the report because he did not agree with it entirely.

27. This evidence needs to be taken in the context of what the witness told Court about what he did during the audit. He stated that following a meeting, prompted by a letter of Kabugi dated 20th June 2002, it was resolved that Kabugi was important for the audit and should be present at all times during the audit process. Second, that about 20 files in Kabugi's office be handed over to him, for him and Kabugi to follow up expenses and do reconciliations.

28. This was not to be because, shortly after, locks to Kabugi's office were changed and Kabugi could not access the office. The auditor however was allowed to access the office and the documents but this is what he remarked:-

"I opened the office and accessed the documents but could not make head or tail of the information."

29. Evidently, the audit report is unhelpful. It is doubted by the maker himself and was based on incomplete and inconclusive documents. If that was all to the matter, then the School would have faced a monumental task in proving the case.

30. But as noted earlier three credible witnesses testified on behalf of the Plaintiff and produced documents. On his part, the Defendant stated that he would have explained the discrepancies if he had access to documents in the School's possession.

31. Mr. Mbabu appearing for the Defendant submitted as follows:-

"It is crucial for the Court to note that during the hearing of the matter before the late Hon. Lady Justice Khaminwa on 5.5.2009, the Defence successfully applied for an adjournment of his witnesses' evidence so that the Plaintiff avails all the authorization notes that accompanied the petty cash vouchers issued by the Defendant. This order is what led to the Plaintiff to file the bundle of Exhibits marked as the Plaintiffs Exhibits No.2."

32. I take it therefore that once Plaintiff's Exhibit No. 2 were filed then the Defence was satisfied that all documents crucial to the

controversy were before the Court. Again, it is not lost on this Court that the Defendant, through a notice to produce dated 20th November 2006, bespoke production of some specific documents from the Plaintiff. The documents said to have been left in the Defendant's office and which the Defendant alleges is critical for his Defence are not in that list. The Defendant cannot now shift the blame to the Plaintiff because there was legal process by which he would have accessed those documents. So, for that reason, Kabugi would only have himself to blame if he was unable, in Court, to account for the money which was collected by him. On the limb of Kshs.3,276,521.25, I hold that the Plaintiff has proved it on a balance of probabilities.

33. I turn to the next claim. It is alleged that the School advanced Kabugi a loan of Kshs.650,000.00. Although in his final submissions there was an attempt by Kabugi to state that the loan was for Kshs.356,000.00 and not Kshs.650,000.00. The Defendant faces a difficulty having expressly admitted the larger sum in his pleadings. This is what is averred in the Amended Defence and Counterclaim:-

“12. The averments of Paragraph 7 and 8 are true save that the Defendant has every intention to repay the schools funds once the matters in dispute herein are fully settled.”

I hold that the Plaintiff has proved its case in this regard.

34. Next is a claim of Kshs.52,100.00 being payment allegedly made by the School to Jet Travel Limited for air tickets for Kabugi and his wife. The Defendant states that the booking was cancelled after he and his wife were unable to get visas to travel and that fresh booking was made through Catalysts Travel Limited and paid by himself. Kabugi argues that if the School paid for the ticket, then he is not liable.

35. In respect to this claim the Plaintiff produced a receipt dated 26th November 2002 (P. Exhibit Page 288) showing that the School paid Jet Travel Limited a sum of Kshs,52,100.00. On his part, Kabugi did not produce any evidence that the booking was cancelled and ought not to have been paid. I find that the claim is proved.

36. There is then an allegation that without authority of the School, the Kabugi granted himself loans to the tune of Kshs.335,364.00. Again, the School produced documents in support of this claim (See for instance P. Exhibit Pages 112, 114, 115, 119, 117, 121). On his part, the Defendant does not provide evidence that he repaid the sums.

37. I turn to the Defendant's Counterclaim which comprises:-

a) *Unpaid salary arrears with effect from 19th January, 2000 and June 2002*
Kshs.1,738,120.00

b) *Unpaid salary with effect from June 2002 – May 2004*Kshs.
4,584,480.00

c) *6 months pay in lieu of notice* Kshs.1,146,120.00

d) *Interest due on provident fund* Kshs.300,000.00

38. In regard to the first claim, the basis is the alleged salary arrangement but which the Defendant himself conceded was not legal. To grant the claim would be to give judicial approval to an illegal transaction. It is declined.

39. The Court has also found that the Defendant was unable to account for money received by him during his employment with the School. The School was therefore entitled to dismiss him summarily and so would not be entitled to salary beyond the date of dismissal or any pay in lieu of notice.

40. As to the interest due on the provident fund of Kshs.300,000.00. The Defendant would be entitled to that sum but it would have to be offset against any sums due from him to the School.

41. Had I, however, found that the dismissal was unwarranted and wrongful, then I would have awarded damages equal to 6 months salary to Kabugi. I reach that decision because even Kabugi himself had sought 6 months pay in lieu of notice.

42. In the end I enter judgment as follows:-

a) Judgment in favour of the Plaintiff against the Defendant for Kshs.4,313,985.20 less any interest due to the Defendant on the provident fund.

b) The Plaintiff shall have interest on the net sum reached in (a) above from the date of filing of the suit until payment in full.

c) The Plaintiff shall have costs of the main claim.

d) The Counterclaim is dismissed with costs to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 13th Day of July 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mbanji holding brief for Mrs Koech for the Plaintiff.

Mbobu for the Defendant.