



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO 81 OF 2006**

**NICODEMUS KIBASO.....PLAINTIFF**

**VERSUS**

**CHAIRMAN OF THE BOARD OF GOVERNORS,**

**MATONGO LUTHERAN THEOLOGICAL COLLEGE.....DEFENDANT**

**JUDGEMENT**

1. **NICODEMUS KEBASO** (now deceased) had filed this suit seeking:

- a) **General damages for breach of contract and malicious falsehoods,**
- b) **Damages for loss of earning for a period of 26 years**
- c) **Aggravated and exemplary damages**

2. **NICODEMUS** died before the matter was concluded and his widow **BERITA NYAKERARIO KEBASO** was allowed to become a party in her capacity as the legal representative of his estate. She now seeks judgment in favour of the deceased's estate.

3. The background to this matter is that the deceased joined **MATONGO LUTHERAN THEOLOGICAL COLLEGE** as a student in 1978 to undergo studies into Theology for 4 years with the aim of becoming a pastor. The deceased commenced his studies and was doing well, but as he progressed, the defendant's management allegedly begun frustrating him, and interrupted his studies by suspending him and showing open hostility towards him.

4. After the interruption and suspension, the Defendant and other authorities of **LUTHERAN CHURCH OF KENYA** (who were the sponsors of the defendant) reconsidered their decision and allowed the deceased to go back and complete his studies at various times, until eventually on September 1994, he was recalled and admitted to finish his diploma in Theology – for a final time. However, the Secretary to the defendant's Board is alleged to have unilaterally, maliciously and without probable cause once again interrupted and refused to allow the deceased into the college from 17.10.1997.

**“The plaintiff's deceased husband being tired of the malicious and unlawful suspensions and interruptions of his studies was forced to take the defendant to court to seek legal redress and he filed *Eld. HCCC No.28 of 1998.*”**

After that suit was filed; the defendants came to court and a consent agreement was entered allowing the deceased to complete his studies. However subsequent to the said consent agreement and orders made in court, the defendant through its principal one **OSMO HARJULA** and its then Chairman **BISHOP NYAMWARO** embarked on a journey of reckless disregard of the court orders with the aim of once again frustrating the deceased to ensure he did not complete his studies. The deceased had to seek intervention from the court several times by applying for committal to civil jail of the defendant's Chairman, Principal and Secretary to the Board of Governors, and the officers were condemned to pay fines and issued with serious warning; before they eventually obeyed the order and issued the deceased with his certificate of Diploma in Theology on 06.06.2006.

5. It is contended that these interruption of studies resulted in the deceased taking 26 years to complete a cause which should have taken 4 years, and caused him to remain unemployed until he attained 53 years of age – by then his choice career of becoming a pastor had been destroyed.

6. The defendant is accused of fraud and malice whose pleaded particulars include inter-alia.

- a) **Deliberate interruption of the deceased studies by illegal suspensions and stoppage of learning,**

- b) Making false accusations that the deceased had not been admitted for the cause of a diploma in theology,
- c) Giving the deceased wrong transcripts,
- d) Issuing the deceased with an unsealed certificate without the proper signatories,
- e) Maliciously awarding the deceased the deceased a General Certificate at his graduation instead of a Diploma Certificate.

7. These actions are described as amounting to a breach of contract malicious falsehood for which he suffered loss and his estate claims the damages accrued. The deceased is said to have lost a lifetime career, failed to secure employment for which he would have earned at least ksh.20,000,000/- pegged to a salary of Kshs.50,000/- per month and he was thus suffered loss of earning.

8. The defendant denied liability stating that the claim is malicious, vexatious, ill-conceived and frivolous, contending that the successful completion of the course was not a guarantee to automatic employment. Further that the deceased failed to pass the examinable subjects and during his sojourn at the college his moral conduct was unacceptable as he engaged in pre-marital sex which resulted in a baby in 1981 – This violated the defendant's tenets of faith, and warranted excluding the deceased from the defendant's community hence the so-called interruptions.

The defendant contends that as an institution, it reserved the right at all times to exclude from continuance at the institution, any student who violated its precepts which required the highest moral turpitude and impeccable integrity in conformity with the doctrine and teachings of the Lutheran Church and the Christian Faith. There was an express requirement that the deceased would abide by all the rules and requisites of the institution which he bound himself to do upon going to the institution.

9. The defendant thus denies acting maliciously but avers that in 1994, the college, upon the application of the deceased, and in the Christian spirit of forgiveness and restoration re-admitted the deceased to the college – this was done as an act of good faith. However even upon re-admission, the deceased instigated the other students to rebellion against authority, leading to a strike in 1996, and the institution had every right to discontinue him, so the fact that he even managed to get a certificate through suing the defendant does not signify an admission of liability.

10. Further that in 1986 the deceased was gainfully employed by the Eldoret office of the **National Cereals and Produce Board**, which later transferred him to Nakuru, and he eventually worked for **Youth for Kanu 92 (YK92)**, so he can now not claim to have suffered lack of opportunity to be employed.

When the plaintiff testified before Kimondo (J) on 11.06.2014, he stated that he had been a member of Lutheran Church since the year 1967 when he was aged 12 years.

11. The plaintiff's statement was basically a reiteration of the pleadings, his contention being that the defendant's duty was to ensure he undertook his course to completion. It was his evidence that after admission, at some point during his stay at the college, he preached a sermon about oppression by the white missionaries which was not acceptable to the college, and he was asked to recant it but he refused, so the College Board met and expelled him. He never received a letter of expulsion, but 12 years later, the college re-called him vide a letter dated 17.03.1996 to re-join.

12. The deceased remained at the institution between 1994 – 1997/98 when he preached a sermon which the College Board found "disturbing, leading to his suspension without a hearing. On 28.01.1998, the Secretary General, one Mundia, wrote a letter informing him that his studies had been terminated **"once and for all"** so he filed **HCCC No.28 of 1998** where he sought re-admission and also an order to restrain the Principal from expelling him and he successfully obtained orders and returned to college.

It was his contention that for the period he was back to college the defendant maliciously frustrated him and kept on suspending him.

Eventually to achieve a truce, the court directed that he should do his exams at the **St. Paul's Theological College in Limuru** – and he did so and eventually he completed. However the defendant handed him a contested certificate which he stated:

***"...I studied at Limuru and passed all examinations. The court directed that I be given a diploma. They brought a diploma with no seal and a foreign transcript. The court called for a proper document, it was withheld by the court. They brought a proper one after that... it was malicious to destroy my career as a pastor... The college was trying to give me a junior certificate instead of a Diploma...this was another incident of frustration."***

It was his contention that the interruption damaged his life and caused him psychological torture, so he never realized his dreams, saying he would have gotten a job much earlier and earned money as a pastor. He then sought to rely on his room-mates tabulation of earning to demonstrate what he could have earned – despite the fact that his room-mate was an arch bishop from a different denomination.

13. Eventually the plaintiff got employed by **Elgon View College** as a chaplain (under the Seventh Day Adventist Church) at a salary of Ksh.7000/-pm and air-time allowance of Ksh.2000/-.

14. PW3 (**CHARLES OMWENGA**) a pastor at **SDA** church in Kisii confirmed that the plaintiff was employed as a pastor in the **SDA** church on account of his holding a Diploma in Theology.

15. This witness on cross examination admitted that he had not presented any documents in court to confirm his qualification or even

establish that he was a pastor. He also conceded that he had no document from his employer demonstrating the terms of service, and stated:

**“... Pastors are paid differently and depending on churches. There is a difference.”**

**BERITA KEBASO** (PW4) basically adopted the deceased's testimony.

**16.** It is not in dispute that the deceased was a student at the defendant's institution, was suspended/expelled, re-admitted, and eventually did his examinations at a different college but was awarded a Diploma in theology. His sojourn at the college was marked by a lot of hiccups which saw him out of the college on several occasions, and even a rub with the defendants in court.

**17.** Although the defendant filed defence and written statements, it did not send a representative for defence hearing.

**18. MR ONYINKWA** on behalf of the plaintiff submitted that the relationship between the plaintiff and defendant as contractual, and the plaintiff had a legitimate expectation to complete his studies and be conformed with a Diploma in Theology.

Unlike the situation in ***OIZI ZAIPPELINE & 39 OTHERS V KARATINA UNIVERSITY & ANOR' (2015) eKLR***, in the present situation the college acknowledged that the plaintiff was its student – but contend that he breached conditions for his stay.

The major issue is – what were the terms of the contract? Did the same include an undertaking not to interfere the deceased's studies at all for whatever reason? Did it have a condition that the study was provided with a target to obtain employment? Is there a guarantee in any of the institutions of learning in Kenya that upon graduation, even with a degree, a job is assured?

**19.** Whatever reasons led to the consent, the bottom line is that after his expulsion from the college, the deceased was eventually re-admitted to pursue his course. Was this the only college offering such a course as he desired? Apparently no, because in his own evidence he confirmed eventually taking up his studies at St Paul's Theological College, Limuru.

If the letter of admissions is to be considered a contract document, then on the face of it, all it bears is an admission to study at the institution. It does not spell out any rules and details placed on either party. It does not bear any guarantee of employment thereafter.

**20.** The plaintiff never presented any employment applications he may have made, which met rejections for want of qualifications. He then sought to rely on a theoretical approach based on speculative prospects that if he had graduated, he would have gotten employment and earned a salary like PW3, yet PW3 did not even establish that he was a pastor at any church, nor did he present anything to demonstrate the salary breakdown. Of greater significance is that the very witness admitted that he belongs to a totally different denomination i.e. the **SDA** church, and that there is not standard scheme of service for Pastors – different churches have different terms and conditions – so the data the plaintiff seeks to rely on is not useful at all.

Due to the consent entered, it becomes difficult to establish whether the expulsion was out of malice, or geared by a desire to have trainees abide by the constitution and ideals of the defendant. Whether the expulsion was because the plaintiff had shown patterns of behavior not befitting a Minister of the gospel with the Lutheran Church of Kenya remains moot. It is the plaintiff who claims that he was expelled because of preaching a controversial sermon, but there is no evidence to confirm that. The extract from the Defendant (Plff Ex.23B) simply stated that the plaintiff “failed to meet the morality bar set by the teachings of the church based on **1 Tim: 2-4 and Titus 1:6**. It made no reference to a Constitutional sermon.

**21.** The refusal to award the plaintiff a diploma can no longer be a subject for this court to declare as a decision was made by another court, directing that the plaintiff be awarded a diploma instead of a general certificate.

My view is that the grievances which the deceased family had, were achieved by;

**(1) The consent entered into in court,**

**(2) The order issued by the court directing that he be awarded a Diploma.**

All the other prayers are based on speculation of would have been, using a dubious criteria of one who does not even belong to same fellowship, and who has admitted that there is no standard term of service scheme for pastors. The upshot is that the suit lacks merit and is dismissed.

Each party shall bear its own costs.

**DATED AND SIGNED at ELDORET this 20<sup>TH</sup> day of DECEMBER 2018**

**H. A. OMONDI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF FEBRUARY 2019**

**O. A SEWE**

**JUDGE**