IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 266 OF 2011

BETWEEN

SALIM AWADH SAID..... 1ST APPELLANT

ABDALLA QATWAN.....2ND APPELLANT

MOHAMED KHAMIS ALI.....3RD APPELLANT

AND

MOHAMED IBRAHIM KHALIL..... RESPONDENT

(An Appeal from the Judgment and decree of the High Court of

Kenya at Mombasa **(J. B. Ojwang', J.)** dated 25th August, 2010

in

H. C. C. A. NO. 217 OF 2006)

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JUDGMENT OF THE COURT

The appellants are aggrieved by the judgment and decree of the High Court which reversed the judgment and decree of the Resident Magistrate **(Adika)** Mombasa.

The 1st appellant, 2nd appellant and 3rd appellants are Chairman,Secretary and Treasurer of Falah Muslim School Society **(Society)** respectively. In the plaint filed in the Resident Magistrate's court, they averred, *inter alia*, that the society is the owner through its trustees of Falah Muslim School which comprises of Madrassa School offering Islamic religious education; that the respondent was an employee of the society as principal of the school for a period of close to 40 years on secondment and/or sponsorship from African Muslim Society; that the respondent was provided with a house within the school compound; that on 9th June 2001, the society wrote to African Muslim Society informing the respondent's sponsor that his services were not required at the school; that the respondent refused to resign and remained at the school without sponsorship from the African Muslim Society; that in the year 2003, the respondent converted one of the classrooms into a dormitory and admitted students from foreign countries;

that on/or about 9th October, 2005 the Board of Trustees and Committee members of teaching staff resolved that the boarding section be closed, which resolution the respondent disobeyed prompting the society to summarily dismiss the respondent as a principal, and that, in spite of the dismissal, the respondent continued to run the boarding facility and to offer teaching lessons to pupils who have forcibly remained in the school. The reliefs sought by the appellants was an order of injunction to restrain the respondent from, among other things, interfering with the management, running and operations of the school, damages and vacant possession of the school house.

The respondent in his defence denied most of the allegations in the plaint including the allegation that he was an employee of the society and averred that although he was earlier seconded to the school by African Muslim Society he was later incorporated into the leadership of the society by virtue of his personal and material contribution for the development of the school; that although he had initially been allocated a house, he was later given a house within the madrassa for his residence due to his immense contribution; that he could not be casually dismissed; and that the issue at hand was the rent being collected by the appellants from residential properties and shops belonging to the society.

Two witnesses gave evidence for the plaintiffs at the trial - Mohamed Khamis Ali, the 3rd appellant and Yusuf Shebwana Ahmed, the current headmaster of the school. On the other hand, the respondent gave evidence and called one witness Mohamed Ibrahim Khalid, the former Vice Chairman of the society.

In a summary the evidence was as follows.

The school- Falah Muslim School Society was formed in 1963 and registered as a society under the Societies Act on 11th April 1963. The society had about 23 members. The school was founded as a charitable education centre to offer non formal Islamic religious studies (madrassa). Pupils admitted to school do not pay school fees.

The school has a management committee and is built on LR No. Block XVII/274 which is registered in the name of the original four trustees, Abdulrehman bin Aboud, Salim awadh, Abdulrahim Ahmed Munshi and Abdulbaqi Abdulrahim Malik who are all deceased. The trust was registered sometime in 1991. In March 2005, the society created the Falah Muslim School Trust Fund with Ali Said Basner, Swaleh Ahmed Imam, Mohamed Omar Ali-Guthmi, and Sheikh Ahmed Bux as trustees. The respondent a Saudi Arabian citizen was posted to the school in 1967 as a teacher and headmaster. He was sponsored by African Muslim Society through Saudi Arabia Embassy. He had been working in the school on a work permit and his salary was being paid through Saudi Arabia Embassy until the school's Board of Trustees by a letter dated 26th October 2005, dismissed him with immediate effect. Two reasons were given for his dismissal namely; disobeying orders to close down the boarding section and dismissal by his sponsor upon attaining the age of 63 years.

The respondent's case was briefly that he joined the school as a headmaster in 1967 and started a boarding section in 1969. As the school did not have money to pay the teachers or to develop the school he searched for sponsors who donated money for the purchase of Plot No. 560/XVII and construction of more classrooms, shops and residential houses under his supervision. In particular, Abdulrahim Ahmed Munshi, a trustee, now deceased, donated money for the construction of three floors and had in addition nominated the respondent to represent him in his absence in all meetings and also to act as alternative trustee in his place. He admitted that he was given a house where he lives with his wife and that his work permit expired on 11th July 2006.

The current situation at the school is that Yusufu Sebwana Ahmed - a Kenyan citizen has been seconded to the school as headmaster by Saudi Arabia Embassy. However, the respondent is still there and is in control of five classrooms, a boarding section with about 80 students, according to him, while the current headmaster has about 250 students and uses four classrooms. The students under the respondent do not mix with others and do not recognize the current headmaster. Apparently, as disclosed by Mohamed Ayub Khamisi (DW2), some members of the society support the respondent's cause while others do not want him.

It seems from the pleadings that the main issue was whether or not the respondent was an employee of the society under a contract of employment capable of termination by summary dismissal. The learned magistrate made a finding that the boarding facility existed long before and the fact of starting a boarding facility was not a valid ground for summary dismissal. However, the magistrate held that the society as an employer of the respondent, had dismissed him as an employee and that the respondent should move out the school premises and challenge the dismissal letter, if so wished. Accordingly, an order of injunction was granted. On appeal to the High Court, the High Court allowed the appeal holding that it was not possible from the evidence to say that there existed an employer and employee contract of employment. The High Court said in part:

"The scenario emerging is that of a religious community social initiative, in which the collective mobilization is the main factor of progress, rather than an organized institutional set-up with structured employer employee relationships. Upon such a framework of social and economic relations, it is not possible to impose the play of the *"simple contract of employment"* ***without doing violence to the focused design and application of the law."***

The appellants both in the memorandum of appeal and in the written submissions in support of the appeal fault those findings. They contend that the school had established administrative structures for the running and management of affairs of the school and that a contract of employment existed. On the other hand, the respondent supports the findings of the High Court in his written submissions and contends that he was more than a teacher as he played a major role in school's establishment and maintenance for which he was never remunerated.

The school was registered as a non-formal education centre. It was established by some members of Muslim community who formed a society which was placed under four trustees. Apparently, the money to construct and run the school came from philanthropists.The African Muslim Society through Saudi Arabia Embassy assisted with professional teachers like the respondent. It paid the salaries of some teachers and the local society paid the salaries of other teachers. The school provides free religious education and free accommodation.

The respondent has superintended over the development of religious education and physical development of the school for about 40 years. His contribution includes mobilising funds for the construction of more classrooms, some shops and residential houses which are generating income for the school.

Although the appellants claimed that the respondent was an employee of the school, no concrete evidence was given to establish a relationship of employer/employee. Indeed, not a single document was produced or oral evidence given relating to the existence or terms of contract of employment. The relationship between the school and the African Muslim Society or Saudi Arabia Embassy was not disclosed. Further, the salary paid to the respondent was not even disclosed. It is not clear whether it was an economic salary or whether the services offered by the respondent had an element of charity. The characteristics of a contract of employment were not proved and the relationship between the school management and the respondent appear nebulous.

It seems that the respondent was posted to the school by African Muslim Society and Saudi Arabia Embassy for the advancement of Islamic religious education for the benefit of the local Muslim community at large and not specifically as an employee of the school. The dividing line between the school society and the local Muslim community is a thin one.

In our view, the dispute between the school society and the respondent is a domestic dispute which can be better handled by the local Muslim community.

In the end we are satisfied that the High Court reached the correct decision. Consequently, the appeal is dismissed with costs to the respondent.

DATED and delivered at Mombasa this 3rd day of April, 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

M.S.A. MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR