



**Barae v Jesuits Fathers Registered Trustees (Cause 2501 of 2017)
[2024] KEELRC 563 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 563 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2501 OF 2017
L NDOLO, J
MARCH 14, 2024**

BETWEEN

JELADINE BOSIBORI BARAE CLAIMANT

AND

JESUITS FATHERS REGISTERED TRUSTEES RESPONDENT

JUDGMENT

1. This matter was initially filed at Nyeri ELRC as Cause No 433 of 2017. By an order made by Ongaya J on 15th December 2017, it was transferred to this Court for hearing and disposal.
2. The issues in dispute as listed by the Claimant in her Statement of Claim dated 6th November 2017 are; unfair termination, house allowance and accrued leave. The Respondent filed a Memorandum of Response on 30th November 2017.
3. At the trial, the Claimant testified on her own behalf and the Respondent called Deogratias Mutayoba Rwezaura who described himself as the Superior of the Jesuits Community at Hekima College. Both parties also filed final submissions.

The Claimant's Case

4. The Claimant states that she was employed by the Respondent in the position of Finance Officer, on a three-year renewable contract effective 27th June 2011. She earned a monthly salary of Kshs. 120,000. The Claimant's last contract was issued on 20th November 2015.
5. The Claimant further states that in June 2016, the Respondent appointed Fr. Fidelis Udahemuka, S.J as Treasurer, who by virtue of the reporting structure, became the Claimant's immediate supervisor.



6. The Claimant claims to have had a frosty working relationship with Fr. Udahemuka. She blamed him for operational lapses within the finance docket. She also accused him of lack of respect, interference and sexual harassment.
7. On 19th July 2017, the Claimant wrote an email to the Provincial who was the overall head, seeking an appointment with him to discuss the matter. The Claimant met with the Provincial on 24th July 2017 and 28th July 2017.
8. The Claimant states that on 1st August 2017, the Provincial wrote to her acknowledging the following:
 - a. That the work environment as between the Claimant and the Treasurer was not conducive;
 - b. That the Claimant seemed to have difficulty working with the supervisor;
 - c. That the matter was compounded by a text message, sent in error by the Claimant to the Treasurer, that was disrespectful and condescending;
 - d. That the Claimant should consider the import of her conduct and determine whether in the prevailing circumstances, she could still continue working with the Respondent.
9. On 7th August 2017, the Claimant wrote back to the Provincial indicating that she had left the matter to the management's good conscience.
10. The Provincial appears to have interpreted this as a resignation letter and went ahead to send an acknowledgement by letter dated 14th August 2017, by which he advised the Claimant to go ahead and clear with the Respondent.
11. On the same day, the Claimant wrote to the Provincial informing him that she had been advised to take a bed rest for four days. The Provincial wrote back on 22nd August 2017, reminding the Claimant to complete her clearance.
12. The Claimant cleared and was paid her salary for the month of August 2017. She however contends that she did not actually resign. She terms the Respondent's acknowledgment of her email of 7th August 2017 as a termination letter.
13. The Claimant's claim is as follows:
 - a. A declaration that the termination of her employment was unfair;
 - b. 12 months' salary in compensation.....Kshs. 1,440,000
 - c. House allowance for 75 months.....1,350,000
 - d. One month's salary in lieu of notice.....120,000
 - e. Accrued leave days for the year 2017.....120,000
 - f. Certificate of service
 - g. Costs plus interest

The Respondent's Case

14. In its Memorandum of Response filed in court on 30th November 2017, the Respondent states that the Claimant entered into a one-year renewable contract of employment on 1st August 2011. The Respondent gives the Claimant's basic salary as Kshs. 82,000.



15. The Respondent states that the Claimant's employment contract was last renewed on 1st August 2014. The Respondent adds that the contract expired on 31st December 2015.
16. The Respondent avers that the Claimant's claims about a frosty relationship with the Respondent's Treasurer were fully investigated and found to be due to her failures. The Respondent terms the allegations of sexual harassment as fabricated and an afterthought designed to craft a claim after resignation.
17. The Respondent concedes that pursuant to the Claimant's email received on 19th July 2017, two meetings were held on 24th July 2017 and 28th July 2017 between the Claimant and the Provincial. According to the Respondent, the Claimant's concerns were investigated and the result of the investigations communicated to the Claimant by letter dated 1st August 2017.
18. The Respondent states that from the investigations, it emerged that the issues raised by the Claimant arose from failures on her part as Finance Officer, which her supervisor pointed out as he should.
19. The Respondent further states that during the two meetings, the Claimant admitted that on 23rd February 2017 at 9.15am, she wrote an insulting, disrespectful, unprofessional and demeaning message to her supervisor. The Respondent adds that at the time the Claimant sent the message, she had absconded duty leaving her supervisor to do her work.
20. The Respondent claims to have given the Claimant a chance to reflect on her misconduct and write an apology letter to the supervisor and to the Provincial, but she instead opted to resign by tendering a resignation letter dated 7th August 2017.
21. The Respondent terms the Claimant's claim as unmeritorious and asks the Court to dismiss it.

Findings and Determination

22. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

23. The Respondent's response to the Claimant's claim of unlawful termination of employment is that in fact, the Claimant herself resigned from employment and all the Respondent did was to accept the resignation.
24. The dispute on this issue was triggered by the Respondent's letter dated 1st August 2017 addressed to the Claimant as follows:

“Dear Mrs. Barare,

Subject: Insubordination and Harassment through Social Media

Peace of Christ,

On July 19 2017, you sent me an e-mail requesting for an appointment to discuss matters pertaining to your office. I granted you audience on July 24, 2017. During this encounter, you raised various issues concerning your immediate supervisor, Fr. Fidelis Udahemuka, including an encounter in your office a few days earlier. You also provided some documents from your office as supporting evidence.



I took time to consult and investigate the matters you raised. Concerning the unpleasant encounter, although you gave your part of the story, it was not totally truthful. Those who were present during this encounter describe it as unacceptable in a working environment between a supervisor and a subordinate.

We had a second meeting on July 28, 2017 to review your complaints and also to give you a feedback on my findings. In the process it became evident that some of the issues that were emerging were failures from your office that your supervisor had to take up upon himself to accomplish. These issues included unpaid bills that date back to 2013 and unclaimed refunds that date back beyond 2013 yet audits have been carried out and budgets have been made and implemented during the time. Further, it became clear that you were uncomfortable with the processes of verification of financial documentation before dispatch although this is really the common and professional practice in financial management.

On continued analysis of the situation, you concurred that the work environment in the finance department was not conducive. The question on whether you really internalised the change of office to have a different supervisor seemed to have been a thorny issue. This has been aggravated by a communication from you which you inadvertently sent to your supervisor on February 23, 2017 at 9:15 AM, stating,

Ananitafuta aje I sent him an sms. Pia kwani hawes kunicall? Or he only has money to call and talk in Kinyarwanda the whole morning?!! Smh!! Najua ameulizwa swali na auditors but cannot answer anything hana mbele wala nyuma huyo

You have acknowledged that this message originated from your phone but you claim that it was meant for a different person and you were talking to the individual about Rwandese who are staying with you in the same apartment. At this particular time, you were supposed to be on duty and your supervisor did not know your where about. Upon inquiry from fellow employees and having received the communication, he gets the above response from you. How about the coincidence of audit that was underway at the time and your office is expected to respond to queries of the auditors as is the general practice? In the message, you scornfully wonder why your supervisor cannot proceed and carry out your work.

This kind of insulting message to your supervisor is not only disrespectful, but also demeaning showing total lack of professionalism, manifests tribal prejudice, deliberately absconding of duty, holding the supervisor and so the whole office at ransom, and basically insinuating that your supervisor is not worthy of holding the office that has been entrusted to him.

Having talked to you about this matter and having given you a chance to write an apology letter both to myself and your supervisor Fr. Udahemuka, you have failed to take the chance that you have been granted. In this regard, I am asking you to carefully review section 9.2 of your contract and determine whether under the prevailing circumstances you can continue working for us. You are expected to file your response by Friday, August 4, 2017 at 3:00 P.M

Yours Sincerely,

(signed)

Fr. Joseph oduor Afulo, SJ

Provincial”



25. The Claimant's response came by a terse letter dated 7th August 2017 stating as follows:

“Dear Sir,

Subject: Response to Ref: 17/2421/8.1.4.susc.bar

By the nature and character of the above referenced letter, it is compelling me to opt out of working with Jesuit fathers Registered Trustees. Since it has been an accusation after another. I leave it to your conscience Fathers.

Yours in Christ,

Jeladine Barare”

26. By a return letter dated 14th August 2017, the Respondent wrote to the Claimant as follows:

“Dear Mrs. Barare

Subject: Resignation

Following your letter of August 7, 2017 in which you opted out of working with the Jesuit Fathers Registered Trustees, with this letter, I am acknowledging receipt of your resignation. I am consequently asking you to prepare and hand over everything pertaining to the office by August 18, 2017 at 3:00 PM to the Treasurer. Your dues will be processed and given to you upon completion of handing over and signing off process. May I take this opportunity to thank you for the work you have done in Jesuit Curia for the last few years. Please be assured of my prayers. God bless.

Sincerely,

Fr. Joseph Oduor Afulo, SJ

Provincial”

27. By her email sent to Provincial Aor provincial.aor@gmail.com on 14th August 2017 at 4.40 PM, the Claimant asserted that she had not resigned, adding that she had been advised by her doctor to rest for the next four (4) days.

28. The foregoing correspondence between the Claimant and the Respondent sums up the dispute before the Court. On the one hand, the Claimant accuses the Respondent of unlawfully terminating her employment while on the other, the Respondent states that the Claimant resigned from employment.

29. The question to ask is whether the Claimant's letter dated 7th August 2017 constitutes a resignation letter. In her final submissions dated 9th November 2023, the Claimant cited the decision in *Edwin Beiti Kipchumba v National Bank of Kenya Limited* [2018] eKLR where it was held that in determining whether an employee has effectively resigned, the Court is called upon to consider the particular circumstances of the case. In that case, Rika J stated as follows:

“The test is whether a reasonable person, would have understood the Employee's statements and actions...to show the Employee to have made a decision to clearly and unequivocally end the employment relationship.”

30. The facts forming the background to the dispute before me are not contested; the Claimant asked to meet the Provincial regarding her working relationship with her supervisor; after two meetings on 24th July 2017 and 28th July 2017, the Provincial wrote to the Claimant on 1st August 2017 giving feedback



on the issues raised by the Claimant. From the record, the Claimant was said to have contributed to the toxic work environment in her office.

31. It is evident that the Claimant was displeased with the feedback from the Provincial and her response was that she was opting 'out of working with Jesuit fathers Registered Trustees'. To a reasonable person, this was a clear and unequivocal statement that the Claimant wished to leave the Respondent's employment. There is no evidence of any attempt to rescind the resignation and the Respondent was well within its right to accept the resignation, which it did.
32. The only finding to make therefore is that the Claimant herself resigned from employment and her claim of unlawful termination is consequently without basis. This dispenses with the claims for compensation and notice pay.

Other Claims

33. The Claimant also claims house allowance. However, her letter of appointment dated 27th June 2011 provided for a gross remuneration of Kshs. 80,000-120,000 which is what she actually earned. Gross remuneration is ordinarily inclusive of house allowance and the claim for house allowance is also without basis and is disallowed.
34. The claim for leave pay was not proved and is dismissed.
35. Finally, the Claimant's entire claim fails and is dismissed with each party bearing their own costs.
36. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MARCH 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Githinji for the Claimant

Mr. Kimathi for the Respondent

