



**Juma v Anglican Church of Kenya, all Saints Cathedral Diocese (Cause 368 of 2016) [2024] KEELRC 13245 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13245 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 368 OF 2016  
MA ONYANGO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**DANIEL MICHAEL JUMA ..... CLAIMANT**

**AND**

**ANGLICAN CHURCH OF KENYA, ALL SAINTS CATHEDRAL  
DIOCESE ..... RESPONDENT**

**JUDGMENT**

1. The Claimant, now deceased, was at the time material to this suit serving as a priest of the All-Saints Cathedral Diocese, Nairobi within the Anglican Church of Kenya and was residing in Nairobi at the time of filing this claim. The Respondent is a religious organization duly registered as such. The All-Saints Cathedral diocese is part of the worldwide Anglican communion and one of the dioceses of the Anglican Church of Kenya (ACK) with the Archbishop of Kenya as its head.
2. It was the Claimant’s case that he was an employee of the Respondent and served as a priest of the Anglican Church of Kenya, in All Saints Cathedral Diocese as at the date of filing suit.
3. The Claimant stated that on 29<sup>th</sup> April 2014, he lodged an application for annual leave of 30 days which was duly approved and which he subsequently extended to 31<sup>st</sup> December 2014 and availed himself for deployment in January 2015.
4. It was the Claimant’s case that he was not deployed despite enquiries and pleas for the same. It was further his case that the Respondent withheld his income without any justification thus rendering him destitute and penniless. He averred that the Respondent excluded him from attending clergy meetings and subjected him to unfair treatment in bad faith without due process or procedural fairness contrary to the provisions of the *Employment Act* 2007.
5. The Claimant stated that from the time of his appointment to the ACK St. Francis Parish to his deployment to ACK St Emmanuel Silanga various changes were made to his contractual arrangements



- to his disadvantage resulting in underpayments, debts and unpaid dues owed to him by the Respondent during his postings in the various ACK parishes.
6. By a Statement of Claim dated 8<sup>th</sup> March 2016 and filed on 10<sup>th</sup> March 2016, the Claimant sought the following orders against the Respondent:
- a. A declaration that the Claimant was constructively dismissed
  - b. A declaration that the constructive termination of employment of the Claimant was unlawful, unfair, inhuman and wrongful
  - c. A declaration that the Claimant was subjected to discriminatory practices to his disadvantage and detriment
  - d. Salary arrears in the sum of Kshs. 855,281
  - e. Underpayment of salaries in the sum of Kshs.3,446,526
  - f. Unpaid salary from January, 2015 to February 2016 in the sum of Kshs.2,018,552
  - g. Unpaid debts owed to the Claimant in the sum of Kshs.401,435
  - h. Unpaid NSSF contributions in the sum of Kshs.11,600
  - i. Unremitted dues to the provident fund pension dues (September, 2013 to January 2016) in the sum of Kshs. 279,811 with interest thereon of 12 % per annum as per terms of the provident fund
  - j. 3 month's salary in lieu of notice in the sum of Kshs. 651,618
  - k. Leave entitlement for the years 2014, 2015 and 2016 in the sum of Kshs. 193,521
  - l. Interest accrued on personal loan from the church commissioners for Kenya of Kshs. 150,800 as at date of filing suit and further interest accrued until payment of the principal sum advanced to the Claimant
  - m. 12 month's salary compensation for unlawful, wrongful and unfair termination
  - n. Damages for wrongful and/or unlawful termination
  - o. Damages for discriminatory practices directed to the Claimant
  - p. Exemplary damages
  - q. Lost salaries due to premature termination of contract in the sum of Kshs. 9,745,624 or in the alternative reinstatement with full benefits
  - r. Certificate of service
  - s. Costs of the claim
  - t. Interest on the above
7. In the Respondent's Defence dated and filed on 1<sup>st</sup> April 2016 it denies the allegations in the Claim and prays that the Claimant's suit be dismissed.
8. The Respondent stated that the Claimant's leave granted in April 2014 was not extended by the Respondent. It denied that there were any unpaid stipends due to the Claimant save for the sum of Kshs 10,221 from Holy Trinity Parish.



9. The Claimant's evidence was taken on 17<sup>th</sup> August, 2018 upon his application as he was unwell and was afraid that he may not be able to testify at the hearing. The Respondent called Frederick Musinde, the Respondent's Diocesan Accountant who only produced the documents on record filed by the Respondent but did not testify. The parties thereafter filed and exchanged written submissions.
10. The conclusion of the case was delaying following the demise of the Claimant and the process of substitution of his name with that of his personal representatives.

### **Claimant's Submissions**

11. The Claimant in its submissions dated 1<sup>st</sup> December 2022 framed the issues for determination to be:
  - i. Jurisdiction – this issue has already been determined and this Court held that it has jurisdiction to handle this case (See the ruling of Mathews N. Nduma J dated 5<sup>th</sup> February, 2018 and delivered on his behalf by myself on 16<sup>th</sup> February, 2018 in Daniel Michael Juma v The Anglican Church of Kenya all Saints Cathedral Diocese [2018] eKLR.
  - ii. Whether there was a contract of service between the Claimant and the Respondent
  - iii. Whether there was an employer – employee relationship as defined by law between the Claimant and the Respondent.
  - iv. Whether the Claimant was constructively dismissed from the establishment of the Respondent.
  - v. If so, Was the constructive termination fair and procedural.
  - vi. Whether the letter dated 29<sup>th</sup> June, 2014 was a resignation letter from the Claimant.
  - vii. Whether Leave of Absence for Study was available to the Respondent's workers.
  - viii. Whether the Respondent was entitled to terminate the services of the Claimant in view of his request for leave of absence.
  - ix. Is the Claimant entitled to the reliefs sought?
12. On the 2<sup>nd</sup> and 3<sup>rd</sup> issues the Claimant submitted that there was a contract of service between the Claimant and the Respondent evidenced by the degree of control and supervision exercised by the Respondent over the Claimant. The Respondent did initiate transfers of the Claimant at will and the Claimant duly complied. The terms of service captured in the Documents set out in the Claimants bundle of documents regulated remuneration that the Claimant received. He was economically dependent upon the Respondent. The Claimant formed an integral part of the Respondent's organization. His entire relationship with the Respondent called upon him to provide leadership in the various parishes he was called upon to minister.
13. On the 4<sup>th</sup> and 5<sup>th</sup> issues the Claimant submitted that he was treated without respect and his dignity was undermined. He was reduced to severe financial want by being denied his dues even as he waited for a deployment that never materialized. He was distressed heavily. He was badly and unfairly treated. No one according to him, had audience to discuss issues arising from non-deployment and non-remuneration. The numerous letters written are all on record. The mistreatment of the Claimant was not just post the letter of 29<sup>th</sup> June, 2014. Even prior to this, new terms of service were adopted by the Respondent as set out at page 279 and 298. The Claimant's salary was not adjusted in spite of numerous complaints in writing. The circumstances in which the Claimant found himself are set out in his letter date 22<sup>nd</sup> January, 2016 which circumstances the Claimant stated forced him to



institute these proceedings for (amongst others) a declaration that he had been constructively dismissed from employment. The dismissal was not voluntary on the part of the Claimant. The conduct of the Respondent was the effective cause of the Claimant deeming himself constructively dismissed.

14. On the 6<sup>th</sup> issue it is submitted that the Claimant did not at any time relinquish his pastoral duties. In all his correspondence and entreaties to His Grace the Archbishop of Kenya & Bishop of All Saints Cathedral Diocese, the Claimant continuously stated that he had a living call to serve God in the Diocese. That his willingness to serve remained constant in the face of all adversity. He did not abandon his duties. He did not by the letter of 29<sup>th</sup> June, 2014 bring his existing relationship with the Respondent to an end. The Respondent offered no evidence to demonstrate this to the Court.
15. On the 7<sup>th</sup> issue the Claimant submitted that the Leadership of All Saints Cathedral Diocese by conduct approved the Claimant's request for leave of absence to explore opportunities of advanced learning. This is confirmed by the confirmation of the appointment of Rev. Capt. Alice Otieno as Acting Vicar of Emmanuel Silanga following the recommendation of the Claimant in the letter of 29<sup>th</sup> June, 2014.
16. On the 8<sup>th</sup> issue the Claimant submitted that if the Respondent determined that the Claimant had absconded duty then the termination process by way of summary dismissal as contemplated by Section 44(4)(a) and Section 41 of the *Employment Act* 2007 should have ensued. That it did not. By the evidence adduced in this Court, no disciplinary measures were undertaken against the Claimant. No termination procedure was put in place. The reason is because the Claimant did not abscond from duty. The Respondent was aware all the time where the Claimant was and what he was doing. The Respondent has adduced no evidence to the contrary.
17. On the 9<sup>th</sup> issue the Claimant submitted that the circumstances set out clearly demonstrate the unfair labour practices he was subjected to.
18. On the 10<sup>th</sup> issue the Claimant submitted that the Respondent is liable to meet the claim(s) put forth by the Claimant as his termination was unlawful and unprocedural.

### **Respondent's submissions**

19. The Respondent in its submissions dated 1<sup>st</sup> December 2022 identified the issues for determination to be:
  - i. Whether the issues submitted to the court by the Claimant are justiciable
  - ii. Whether the Claimant abandoned his duties with the Respondent
  - iii. Whether the Claimant is entitled to the prayers sought in the statement of claim
  - iv. Who should pay the costs of the claim
20. On the 1<sup>st</sup> issue the Respondent submitted that the relationship between the Claimant and the Respondent was purely of a spiritual and religious nature. It is not in dispute that the Claimant has pleaded no contract of employment. That the Claimant accordingly has no cause of action in law. Section 12(1) of the *Employment and Labour Relations Court Act* does not confer jurisdiction on this Honourable Court to determine any dispute arising between a Priest and the Church.
21. On the 2<sup>nd</sup> issue the Respondent submitted that the Claimant's allegations that he was constructively terminated from the Respondent's employment are false, misleading and without any factual or legal foundation whatsoever. On the contrary, the Claimant's conduct amounted to constructive resignation from his position as a Priest and/or relinquishment of his duties for the reasons that:



- i. The Claimant did not consult the Respondent and made the decision to extend his leave of absence unilaterally;
  - ii. The Respondent did not consent to the Claimant's leave of absence;
  - iii. The Respondent had no alternative but to take urgent measures to have the congregation in the parish served by another priest;
  - iv. The Claimant abandoned his duties with the Respondent thereby bringing the existing relationship to an end;
  - v. The Claimant absconded his duties for a period of about six months.
22. On the 3<sup>rd</sup> issue the Respondent submitted that the Claimant is not entitled to any of the prayers sought in the Statement of Claim.
23. On the 4<sup>th</sup> issue the Respondent submitted that it has sufficiently demonstrated that the claim herein is without merit. In light of this, the Claimant's claim should be dismissed with costs to the Respondent

### **Determination**

24. Having considered the pleadings and submissions of the parties, the issues arising for determination are in my considered opinion the following:
- i. Jurisdiction of this court to try this suit;
  - ii. Whether there was an employment relationship between the Claimant and the Respondent;
  - iii. Whether such employment relationship, if any, was terminated by constructive dismissal of the Claimant or by the Claimant absconding duty;
  - iv. Remedies, if any, due to the Claimant.

### **Jurisdiction**

25. The issue of jurisdiction of this court was dealt with in the ruling of this Court (Mathews N. Nduma J) dated 5<sup>th</sup> February, 2018 and delivered on his behalf by myself on 16<sup>th</sup> February, 2018. In the Judgment the court stated as follows:
12. The Claimant consented to be bound by the Constitution laws and Regulations of the Diocese of All Saints Cathedral and further undertook to submit to any sentence which may at any time be passed upon him after due examination by any court acknowledged by the said synod for the trial of the clergyman, saving all rights of appeal allowed by the said synod.
  13. The statement of claim filed by the claimant does not disclose any attempt by the Claimant to have the employment dispute between him and the church resolved within the constitutional frame work of the church to which he has willfully submitted to.
  14. It is the court's considered view, that whereas the statement of claim discloses serious triable issues arising from a relationship of service between the parties, the court is slow to delve into the matter before the matter is ventilated upon by the church.
  15. For the avoidance of doubt, this court has jurisdiction on the alleged violation of the contract of employment, arbitrary reduction of salary and subjection to unfair labour practices alleged in the memorandum of claim.



16. However, the court has decided to give the parties a chance in deference to the church, and that holy calling to priesthood to resolve the dispute amicably applying internal mechanisms within thirty (30) days of this ruling, failing which the suit be set down for trial on a priority basis before the court at Nairobi.
26. The ruling conclusively dealt with issue No. 1 and also touched on issue No. 2 herein. I will thus not deal with issue No. 1 as that would amount to reviewing the decision of my brother.
27. On the issue whether there was an employment relationship between the Claimant and the Respondent, as already stated by my brother in his ruling, the entry of the Claimant into the congregation of the Respondent was not through a normal employment relationship.
28. The Claimant was first ordained as a priest following which he signed the Oath of Canonical Obedience through which he consented to be bound by the Constitution, laws and Regulations of the Diocese of All Saints Cathedral and any other enactments by the Diocesan Synod and to submit himself to any sentence which may be passed upon after examination by any court acknowledged by the Synod for the trial of a Clergyman, subject to rights of appeal allowed by the said Synod.
29. The Claimant also signed a Declaration of Assent to be bound by the Articles of Religion and the Book of Common Prayer, and the Ordering of Bishops, Priests and Deacons as set forth in the Constitution of the Anglican Church of Kenya. All these were done on the date of ordination, upon which the Claimant was issued with a license to officiate in the Diocese of All Saints Cathedral.
30. Following his ordination and the signing of the said instruments the Claimant was posted by the Respondent to commence his pastoral duties.
31. Service under the Respondent came with a package that included a salary within a structured Strategic Operational Manual Human Resource Policy document for the All Saints Cathedral Diocese. Included in the Manual are terms and conditions of service for all staff including remuneration and benefits. Under paragraph 5.3.7.1 it is provided that on appointment all staff shall be taken through orientation, induction and probation. For ordained ministry staff it is provided that clergy appointed to take charge of a parish for the first time after ordination “shall be on probationary period for one year (reference to Anglican Church of Kenya administrative policy manual article 7:1)”.
32. Under paragraph 5.3.14 on promotion and demotion, it is provided:

For clergy, the Bishop’s Examining Chaplaincy shall make recommendations to the Diocese Bishop in line with the Diocesan Constitution.
33. Under leave policy it is provided that clergy shall be entitled to 30 days leave.
34. The Respondent has a grading structure which includes salary scales for priests that determined their remuneration package, allowances and benefits. Throughout his employment with the Respondent the Claimant was paid a defined salary and allowances as communicated to him by the Respondent. For instance, at pages 12, 39, 40 and 42 of the Claimant’s documents are letters communicating to him his salary and benefits.
35. The Employment Act defines “employee” to mean a person employed for wages or a salary and includes an apprentice and indentured learner;
36. The Act defines “employer” to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;



37. In *Maurice Oduor Okech v Chequered Flag Limited* (2013) eKLR, the ELRC the court stated in determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the *Employment Act*, 2007 actually exists.
38. In the instant case the Claimant submitted that there was a contract of service between the Claimant and the Respondent evidenced by the degree of control and supervision exercised by the Respondent over the Claimant. That the Respondent did initiate transfers of the Claimant at will and the Claimant duly complied. That the terms of service captured in the Documents filed by the Claimant regulated remuneration that the Claimant received. That he was economically dependent upon the Respondent. That the Claimant formed an integral part of the Respondent's organization. That his entire relationship with the Respondent called upon him to provide leadership in the various parishes he was called upon to minister.
39. It is my finding that although the Claimant was not employed through a formal letter or contract of employment, he was indeed an employee of the Respondent by virtue of his terms and conditions of employment as well as the control the Respondent had over the relationship.

**Whether the Claimant's employment was terminated by constructive dismissal or he absconded duty**

40. It was the Claimant's case that he went on annual leave in May 2014 which was to end on 30<sup>th</sup> June 2014. That while on leave he had travelled to the USA on the invitation of a friend. That while there he developed interest in furthering his studies and wrote to the Bishop asking for leave of absence without pay for 6 months but did not receive any response. That he cancelled his leave of absence in December 2014 and travelled back home. That he informed his Bishop that he was available for deployment from January 2015.
41. That while he was away on leave and with approval of the Bishop, he had appointed Rev. Alice Otieno to be acting vicar in his parish ACK Emmanuel Church Silanga until he resumed duty. That during his extended leave Rev. Alice Otieno was issued with a letter of appointment as Acting Vicar of ACK Emmanuel Church Silanga until further notice.
42. The Claimant stated that the Bishop acknowledged his letter and informed him that he would revert to the Claimant once he got a suitable vacancy. That the Claimant waited for a year and 2 months but did not get any feed-back in spite of his many inquiries and reminders.
43. The Claimant stated that he received no income during the waiting period. That there was no communication on whether his employment had been terminated, or he was on suspension or undergoing any form of disciplinary action. That out of desperation he wrote to the Bishop stating that he considered himself to have been constructively terminated.
44. As already stated above, the Respondent did not call any witness but relied on the affidavit of Frederick Musinde, the Respondent's Diocesan Accountant, sworn on 5<sup>th</sup> July 2019 in which he adopted and produced the documents filed by the Respondent.
45. It is submitted for the Respondent that the Claimant applied for and was granted leave of 30 days during which he travelled to the USA but failed to report back citing personal reasons that he intended to pursue. That the Claimant made a unilateral decision to leave the church and was absent from the Church for 6 months.



46. It is submitted that as a result of his absence the Church made urgent arrangements to replace the Claimant to ensure the Church at St. Emmanuel, Silanga was attended to by another Clergy. That on the Claimant's return there was no available places for him to be posted as a Minister. That the Claimant consequently filed the instant Claim alleging constructive dismissal.
47. It is the Respondent's submission that the Claimant's leave granted in April, 2014 was not extended by the Respondent. That the Claimant's allegations of constructive dismissal are false, misleading and without factual or legal foundation. That on the contrary it is the Claimant's conduct that amounted to constructive resignation as the Claimant did not consult the Respondent and made the decision to extend his leave of absence unilaterally, without the Respondent's consent. That the Claimant abandoned his duties and absconded duty for 6 months, bringing the existing relationship to an end. That having ended his duty the Claimant cannot seek to hold the Respondent liable for constructive dismissal.
48. Paragraph 10.9 of the Respondent's Human Resource Policy provides for leave of absence for purposes of furthering education without pay not exceeding 6 months. The wording used imply that the application for leave of absence must be justified in writing and if granted, shall be given without pay and shall not exceed 6 months.
49. The Claimant applied for leave but did not get any response as to whether or not the same had been approved or rejected. This court has time and again held that an employer is obligated to make a decision one way or other and cannot just keep quiet and expect the employee to make assumptions or make decisions over work related issues. An employer is in control of the employment relationship and must decide and communicate its decision to an employee over work related matters, especially where an employee has applied for permission from the employer.
50. In the instant case the regulations were explicit that the leave must be approved before an employee can proceed on the leave of absence. I thus find that the Claimant's educational leave was not approved by the Respondent.
51. I however do not agree with the Respondent's argument that the same constituted a fundamental breach of contract that the Respondent could treat as a repudiation of the employment contract. An employer cannot presume fundamental breach of an employment contract. It must communicate to the employee its position and require the employee to report back to work failing which the employment would be terminated. The employer must thereafter communicate its decision to terminate the employment contract.
52. An employer who fails to follow this process and who decides to keep silent in such a situation would be presumed to have constructively dismissed an employee as has been held by many decisions of this court and the court of Appeal. In the case *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, the court observed as follows:
- “An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
53. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that
- “Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”



54. In the instant case the Respondent was all along in contact with the Claimant and knew where he was and why he was away. The Respondent did not reply to the Claimant's request in the negative and require him to report back to work. Put differently, the Claimant did not refuse to report back to work. The Respondent let him decide after it failed to either accept or reject his application for extension of leave.
55. When the Claimant came back from the extended leave which the Respondent neither approved or declined, he reported to the Respondent that he was back and was ready to resume duty by his letter dated 15<sup>th</sup> December, 2014. The Respondent acknowledged the letter by its letter dated 7<sup>th</sup> January, 2015 which is reproduced below:

All Saints Cathedral Diocese

Anglican Church of Kenya

7<sup>th</sup> January 2015

Dear Rev. Juma,

Re: Response to Your Letter

Receive New Year greetings for the Diocese.

We acknowledge receipt of your letter dated 15<sup>th</sup> December, 2014 on revocation of leave of absence which you applied for in your letter of 29<sup>th</sup> June, 2014.

Subsequent to your letter of 29<sup>th</sup> June, 2014 the Diocese had made arrangements for the smooth running of Emmanuel Silanga Parish. We will therefore revert back to you once we identify a place where you can serve.

Meanwhile we wish you and your family a prosperous 2015 and in furthering your studies.

Yours faithfully,

Signed

The most Rev. Dr. Eliud Wabukala

Archbishop of Kenya &

Bishop of All Saints Cathedral Diocese

Cc – Diocesan Administrative Secretary

56. The Respondent did not demonstrate that the leave of absence was not recognized. It did not communicate to the Claimant that he was no longer deemed to be an employee. The Claimant, though not receiving any salary or remuneration, patiently waited for direction from His Grace the Archbishop of Kenya and Bishop of All Saints Cathedral Diocese as per the contents of the letter dated 5<sup>th</sup> January, 2015. He appealed to the Administrative Secretary that unpaid debts owed to him by the Church be settled. He made enquiries to the persons concerned. When no positive reaction was forthcoming the Claimant wrote the letter dated 29<sup>th</sup> April, 2015 (See DMJ 63 at page 120 of the Claimant's Bundle of Documents.
57. A response was made to the letter and to the Claimant's enquiries. On the 5<sup>th</sup> May, 2015 the Archbishop of Kenya & Bishop of ASCD wrote to the Claimant as follows:
- All Saints Cathedral Diocese Anglican Church of Kenya
- May 5<sup>th</sup> 2015



Rev. Daniel Juma

All Saints Cathedral Diocese, NAIROBI.

Dear Rev. Daniel Juma,

Re: Salary and Other Remunerations

Receive Christian greetings.

This is to bring to your attention that I am aware of your communications to some of our lay officials concerning your salary and other remunerations. I wish to advise you to direct your future concerns to this office as you await our official communication in regard to your complaints. Meanwhile I wish you well as you wait upon the Lord.

Together for Christ,

Signed

The Most Rev. Dr. Eliud Wabukala

The Archbishop of Kenya & Bishop of ASCD

Copy to: Diocesan Administrative Secretary

58. The Claimant followed up on this communication from His Grace the Archbishop of Kenya and Bishop of ASCD with various letters seeking for help being the Letter dated 19th June, 2015 (DMJ 75 at page 145 of the Claimant's Bundle of Documents Letter dated 25th June, 2015 (DMJ 76 at page 151 of the Claimant's Bundle of Documents; Letter dated 2nd September, 2015 (DMJ 77 at page 152 of the Claimant's Bundle of Documents; Letter dated 28th September, 2015 from M/S Ameka & Company Advocates (DMJ 78 at page 153 of the Claimant's Bundle of Documents.
59. No response was received to all these letters. Having waited for a response to his letters in vain, the Claimant decided to write the letter dated 22nd January, 2016 (DMJ 79 at page 156 of the Claimant's Bundle of Documents) deeming himself to have been constructively terminated from employment contrary to the Constitution of Kenya 2010. Even for this letter there was no response from the Respondent. it was then that the Claimant lodged this suit on the 10<sup>th</sup> March, 2016.
60. The court finds that in the circumstances of this case, the Claimant was entitled to deem his employment as having been constructively dismissed. I thus hold that the Respondent by its conduct, constructively dismissed the Claimant.

## Remedies

61. Having found that the Respondent constructively dismissed the Claimant, I now turn to the remedies sought in the claim which I will consider under separate heads as per prayers in the claim.
  - a. A declaration that the Claimant was constructively dismissed  
As I have already found above, the Claimant was constructively dismissed by the Respondent. I accordingly declare so.
  - b. A declaration that the constructive termination of employment of the Claimant was unlawful, unfair, inhuman and wrongful  
This is covered under (a) above.



- c. A declaration that the Claimant was subjected to discriminatory practices to his disadvantage and detriment  
This is also covered under (a) above.
- d. Salary arrears in the sum of Kshs.855,281  
The particulars of this claim are set out at pages 104 and 105 of the Claimant's bundle. The Respondent did not specifically deny the contents of the letter or specifically rebut the Claimant's evidence that his salary was arbitrarily reduced upon his transfer from Emmanuel Church Silanga. I find that the Claimant has proved on a balance of probabilities that he is entitled to the same and award him the said Kshs. 855,281.
- e. Underpayment of salaries in the sum of Kshs.3,446,526  
This claim is stated by the Claimant to have accrued in January, 2011. At the time of filing suit in 2016 the claim was statute barred. The same is accordingly rejected.
- f. Unpaid salary from January, 2015 to February 2016 in the sum of Kshs.2,018,552  
In view of the fact that the Claimant was on unpaid leave and never resumed duty upon his return in January, 2015, he is not entitled to any salary from January 2015. The prayer is rejected.
- g. Unpaid debts owed to the Claimant in the sum of Kshs.401,435  
The Respondent is not liable for the unpaid personal debts of the Claimant. The claim for the same is rejected.
- h. Unpaid NSSF contributions in the sum of Kshs. 11,600  
Any NSSF contributions not paid can only be claimed by NSSF which has the administratively machinery and legal authority to claim the same. The Claimant has no capacity to make this claim. The claim is accordingly rejected.
- i. Unremitted dues to the provident fund pension dues (September, 2013 to January 2016) in the sum of Kshs. 279,811 with interest thereon of 12 % per annum as per terms of the provident fund  
As in the Claim for NSSF, the pension scheme is authorized by law to make this claim against the Respondent and not the Claimant. The prayer is rejected.
- j. 3 month's salary in lieu of notice in the sum of Kshs. 651,618  
The Claimant did not prove that his terms of service entitle him to 3 months' notice or pay in lieu. I award him one months' salary in lieu of notice in the sum of Kshs. 217,206.
- k. Leave entitlement for the years 2014, 2015 and 2016 in the sum of Kshs. 193,521  
The Claimant took leave in 2014. He is not entitled to leave for 2015 and after as he did not perform any service after 2014. The prayer is rejected.
- l. Interest accrued on personal loan from the church commissioners for Kenya of Kshs. 150,800 as at date of filing suit and further interest accrued until payment of the principal sum advanced to the Claimant  
The Respondent is not liable for the Claimant's personal loans or interest thereof. This prayer is rejected.



- m. 12 month's salary compensation for unlawful, wrongful and unfair termination

Having found that the Claimant's employment was terminated unfairly by way of constructive dismissal he is entitled to compensation. I have considered the circumstances under which the Claimant's employment was terminated, his length of service and all other relevant factors under section 49(4) of the *Employment Act* and in my view compensation equivalent to 10 months' salary is reasonable. I award the Claimant 10 months' salary as compensation in the sum of Kshs. 2,172,060.

- n. Damages for wrongful and/or unlawful termination

This is covered under compensation for unfair termination in (m) above.

- o. Damages for discriminatory practices directed to the Claimant

This is also covered under (m) above. The Claimant did not prove that he was entitled to compensation for damages as a separate head in addition to compensation for unfair treatment.

- p. Exemplary damages

The circumstances under which the Claimant's employment terminated do not qualify for exemplary damages as set out in *Obonyo and Another v Municipal Council of Kisumu* (supra) at 94 where the predecessor of this Court, referring to the English Decision of *Rookes v Barnard and Others* (1964) AC 1129 stated that:

it will be convenient to begin summarizing very briefly the effect of *Rookes v Barnard*. In the first place, it was held that exemplary damages for tort may only be awarded in two classes, of case (apart from any case where it is authorized by statute, these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government (emphasis in original) and secondly where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behavior, the punishment imposed must not exceed what would likely have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account."

The prayer is rejected.

- q. Lost salaries due to premature termination of contract in the sum of Kshs. 9,745,624 or in the alternative reinstatement with full benefits

This court had opportunity to consider the prayer for lost earnings in the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR where the court observed:

In *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in *Engineer Francis N. Gachuri v Energy Regulatory Commission* [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

"There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack



of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word “permanent employment...”

Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.

For the same reasons, I decline to award this prayer.

r. Certificate of service

It is my view that this prayer has been overtaken by events following the demise of the Claimant. I make no award on the same as the certificate would have been personal to the Claimant.

s. Costs of the claim

The Claimant is awarded costs of this claim.

t. Interest on the above

Interest shall accrue on decretal sum at court rates from date of judgment.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**M. ONYANGO**

**JUDGE**

