



**Mbithi v Mbilika & 3 others (Sued as the Committee Members of District Church Council Committee (AIC Muumandu DCC)) (Cause E114 of 2021) [2023] KEELRC 3001 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3001 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E114 OF 2021**  
**JK GAKERI, J**  
**NOVEMBER 23, 2023**

**BETWEEN**

**JONATHAN MBITHI ..... CLAIMANT**

**AND**

**BENSON MWANZIA MBILIKA ..... 1<sup>ST</sup> RESPONDENT**

**BENJAMIN KISOI MASANI ..... 2<sup>ND</sup> RESPONDENT**

**JACKSON MWEU NZIOKA ..... 3<sup>RD</sup> RESPONDENT**

**FREDRICK MUSYOKI MUSAU ..... 4<sup>TH</sup> RESPONDENT**

**SUED AS THE COMMITTEE MEMBERS OF DISTRICT CHURCH COUNCIL COMMITTEE (AIC MUUMANDU DCC)**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 12<sup>th</sup> February, 2021 alleging unlawful termination of employment by the Respondent.
2. The Claimant prays for;
  - a. A declaration that the Claimant's employment by the Respondent was unlawful, unjustifiable and unfair.
  - b. The sum of Kshs.525,600.00 comprising;
    - i. One month's salary in lieu of notice Kshs.21,900/=.
    - ii. Salary from November 2020 to 8<sup>th</sup> September, 2021, the date of retirement Kshs.240,900.00.



- iii. 12 months compensation Kshs.262,000.00.
  - c. Costs of the suit.
  - d. Interest on (b) and (c) above.
  - e. Any other relief the court may deem fit and just to grant.

**The Claimant's case is pleaded as follows;**

3. It is the Claimant's case that he was employed by the Respondent sometime in 2007 as a Pastor at Kshs.8,500/= which rose to Kshs.21,900/= by the date of termination of employment.
4. That by letter dated 5<sup>th</sup> September, the Claimant was sent on compulsory leave without justification as the meeting of Pastors that led to the compulsory leave passed no resolution on the issue and his counsel responded to the Respondent.
5. The Claimant avers that by letter dated 17<sup>th</sup> September, 2020, the Respondent informed him that his retirement date was 31<sup>st</sup> December, 2020 having attained 70 years and the last day of service was 1<sup>st</sup> January, 2021.
6. That his counsel wrote to the Respondent clarifying that he was born on 8<sup>th</sup> September, 1951 and his retirement date was 8<sup>th</sup> September, 2021.
7. The Claimant offered to retire if he was paid all his dues till the date of retirement.
8. That by letter dated 27<sup>th</sup> September, 2020, the Respondent vacated the letter dated 17<sup>th</sup> September, 2020 on the Claimants retirement.
9. That the Claimant could not work in such environment.

**Respondent's case**

10. The Respondent admits that the Claimant had been its employee since 2007 as a Teaching Elder and was thus bound by the By-laws of the Church.
11. That the Claimant's tenure was characterised by differences and friction with Lay Pastors working with him and was admonished for them. For instance, the differences between the Claimant and one Dorcas Mwanzia were discussed by the District Church Council (DCC) on 30<sup>th</sup> August, 2020 and it was resolved that both proceed on compulsory leave on full pay to facilitate investigation and consultations, but both were recalled and expected to report on 4<sup>th</sup> October, 2020.
12. It is the Respondent's case that it issued and retracted the letter of retirement dated 27<sup>th</sup> September, 2020 after the Claimant provided a birth certificate.
13. The Respondent avers that an invitation to the Claimant for consultative meeting was not honoured by an attendance or apology and he did not report to work on 4<sup>th</sup> October, 2020 as envisioned but was spotted running another church.
14. The Respondent further avers that the Claimant transferred church property at AIC Kwa Kavuti Church to another church and the matter was reported to the police who summoned him and he admitted having done so and the same were returned to the church on 26<sup>th</sup> October, 2020, after a handover at the Muumandu Police Post.



15. The Respondent avers that it wrote to the Claimant on 4<sup>th</sup> November, 2020 informing him that his employment had been terminated on account of desertion and he did not respond but filed the instant suit.
16. That the Claimant's salary was paid up to 30<sup>th</sup> September, 2020.

#### **Claimant's evidence**

17. On cross-examination, the Claimant admitted that he was sent on compulsory leave vide letter dated 5<sup>th</sup> September, 2020 following a dispute with a lady Pastor after appearing before the DCC Executive.
18. The Claimant further admitted having been summoned by the police.
19. The Claimant further testified that he did not start another church, but it was a fellowship.
20. Similarly, the Claimant admitted that the Respondent requested him to return to work in writing but he declined to do so and did not do so at all but denied having deserted the workplace.
21. The Claimant testified that he did not resume duty because he was stressed by the compulsory leave, retirement letter as well as the disagreement with Pastor Dorcas Mwanzia.
22. It was his testimony that he was aware of but did not invoke the internal dispute resolution mechanism.

#### **Respondent's evidence**

23. RWI, Mr. Titus Mutiso confirmed on cross-examination that the Claimant left the meeting after banging the table and did not respond to the Respondent's letter dated 2<sup>nd</sup> October, 2020 and did not request for leave personally.
24. The witness confirmed that the Claimant was not paid after September 30<sup>th</sup> 2020.
25. That Pastor Dorcas Mwanzia was still an employee of the Respondent.
26. Finally, the witness confirmed that the church the Claimant started was not a fellowship.
27. On re-examination, the witness confirmed that church items were stolen and were found in the church the Claimant had started and were returned.

#### **Claimant's submissions**

28. According to the Claimant's counsel, the Claimant was constructively dismissed and the Claimant had discharged the burden of proof by the Respondent and the Respondent did not wish to retain him as exemplified by the retirement letter dated 17<sup>th</sup> September, 2020 as his age was never an issue.
29. Contrary to counsel's submission that letters to attend meetings were not served, the Claimant did not deny the fact of service.
30. Counsel submitted that the Respondent was obligated to explain to the Claimant the outcome of the dispute referred to them.

#### **Respondent's submissions**

31. By 9<sup>th</sup> October when the court retired to prepare this judgement, the Respondent had not filed submissions.



## Determination

32. The issues for determination are;
  - i. Whether the Claimant was constructively dismissed by the Respondent or absconded duty.
  - ii. Whether the Claimant is entitled to the reliefs sought.
33. Documents on record reveal that the Claimant joined the Respondent as a Teaching Elder in September 2007.
34. Strangely, the Claimant signed the contract on 5<sup>th</sup> April, 2010.
35. Records also reveal that the Claimant and a lady Pastor were in a disagreement and both attended the DCC Executive meeting held on 30<sup>th</sup> August, 2020.
36. Minutes show that the Claimant was adamant and was not ready for an agreement or work with the lady Pastor who was a student.
37. At its meeting held on 14<sup>th</sup> September, 2020, the Executive considered a wide complement of agendas including the Claimant's AIC Church at Kwakavuti.
38. The Chairman of the meeting reported that although the Claimant and Dorcas testified in an earlier meeting, no agreement was reached and the Claimant had told the office to do what it wished as he was not ready to work with the Lady Pastor.
39. Also discussed was the Claimant's retirement as his Identity Card showed that he was born in 1951.
40. The meeting resolved that the Claimant be issued with a retirement letter and the letter dated 17<sup>th</sup> September was issued.
41. The meeting resolved that the two Pastors proceed on leave.
42. In an endeavour to resolve the disagreement, the meeting held on 25<sup>th</sup> September, 2020 resolved that Dorcas Mwanzia be posted to AIC Kwakatheka and the Claimant be invited for consultations on 2<sup>nd</sup> October, 2020.
43. In their response to the letter, the Claimant's law firm provided a copy of the Claimant's birth certificate which showed that he was born on 8<sup>th</sup> September, 1951.
44. Intriguingly, the document has been interfered with as a change in the date of birth is apparent to the naked eye.
45. By letter dated 2<sup>nd</sup> October, 2020, the DCC wrote to the Claimant informing him that he had not attended a scheduled consultative meeting and the DCC was desirous of consulting him on matters germane to the AIC, Kwakavuti.
46. It is against this background that I now proceed to determine whether the Claimant's employment was constructively terminated or he absconded duty.
47. The principle of constructive dismissal though not expressly provided for by the [Employment Act](#), 2007 is now firmly rooted in Kenya's employment law.
48. The most authoritative articulation of the principle are the celebrated sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp*.



49. The essential element of the principle of constructive dismissal is the employer's conduct. It must be demonstrated that the employer's conduct left the employee with no option but to quit with or without notice.
50. The employee bears the burden of proof to demonstrate that the employer committed a repudiatory breach of the contract of employment.
51. That his conduct revealed that he did not consider himself bound by a fundamental term of the contract.
52. Significantly, the employee must demonstrate the causal link between the employer's conduct and his resignation.
53. In *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga*, the Court of Appeal adopted the contractual approach test and articulated the guiding principles in determining whether constructive dismissal has taken place.
54. In the instant suit, the Claimant relies on the Respondent's letter on retirement dated 27<sup>th</sup> September, 2020 and the compulsory leave to allege that the Respondent wanted him out of employment. However, documentary evidence on record shows otherwise.
55. On the compulsory leave, it is common ground that the Claimant could not agree with a Lady Pastor by the name Dorcas Mwanzia with whom he was serving at the AIC Kwakavuti and the disagreement was escalated to the DCC and the two Pastors were invited to explain themselves. The meeting was held on 30<sup>th</sup> August, 2020.
56. From the minutes on record, it is evident that both pastors were accusing each other on various issues including performance, disrespect and the Claimant's management style.
57. The minutes reveal that the Claimant was emphatic that he was not ready to work with the Lady Pastor and was not ready for a compromise.
58. The committee resolved to send the two Pastors on leave and other pastors would in the meantime be performing church functions at the AIC Kwakavuti.
59. The foregoing would appear to controvert the Claimant's allegation that he was sent on compulsory leave without justification.
60. The minutes of the DCC Meeting held on 30<sup>th</sup> August, 2020, which the Claimant did not contradict or disown are unambiguous that he was not ready for a compromise leaving the DCC with no alternative but sent the two Pastors on leave as the matter was being addressed.
61. The issue was also captured in Minute 5 of the meeting held on 14<sup>th</sup> September, 2020 by way of a report by the Chairman.
62. The Chairman was unequivocal that the Claimant was adamant that he would not work with Pastor Dorcas Mwanzia.
63. By letter dated 27<sup>th</sup> September, 2020, the Claimant was notified of completion of the compulsory leave and was directed to resume duty on 4<sup>th</sup> October, 2020. He confirmed on cross-examination that he did not and never reported to the church again.
64. From the evidence on record, it is clear that the Claimant was aware of the reason(s) for the compulsory leave. This perhaps would explain why he did not appeal the decision.



65. As regards the date of retirement, the issue came up during the DCC Meeting held on 14<sup>th</sup> September, 2020.
66. According to Minute 6, the DCC was informed that the Claimant was born in 1951 and was thus due for retirement on 1<sup>st</sup> January, 2021.
67. This Minute was the basis of the letter to the Claimant dated 17<sup>th</sup> September, 2020 on retirement on attaining the age of 70. The letter signed by the Secretary DCC informed the Claimant that his last day of service was 1<sup>st</sup> January, 2021.
68. Was the notice of retirement grounded on malice as alleged?
69. The answer to this question is in the negative.
70. It is common knowledge that retirement is a process and inevitable for all employed person who attain the prescribed age while still in service, and both employer and employee ought to be alive to that fact for purposes of succession planning for the employer and preparation for the employee.
71. More significantly, however, the national identity card of the Claimant which the DCC relied upon show that the Claimant was born in 1951 with no date or month. The committee could not accord the Claimant a birthday other than the beginning of that year on 1<sup>st</sup> January, 2021.
72. The Claimant had not provided a birth certificate and the decision was changed when he provided a copy of the birth certificate, the changed date of birth notwithstanding.
73. In the totality of the foregoing, it is the court's view there was nothing malicious about the discussion and the resolution of the DCC on 14<sup>th</sup> September, 2020.
74. The decision was informed by the documents the committee had at its disposal on matters age of the Claimant.
75. In sum, the Claimant has failed to prove on a balance of probabilities that his employment was constructively terminated by the Respondent.
76. As to whether the Claimant deserted the workplace, the court proceeds as follows;
77. According to Black's Law Dictionary 10<sup>th</sup> Edition, desertion means;  

“ The wilful and unjustified abandonment of a person's duties or obligations.”
78. A distinction between desertion and unauthorised absence from duty was made in the South African Case of *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) that;  

“ . . . the employee who deserts is or her post does so with the intention of not returning, or having left his or her post formulates the intention not to return.”
79. As held by *Ndolo J. Ronald Nyambu Daudi V Tornado Carriers Ltd* (2019)  

“Desertion of duty is a grave administrative offence which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee



and putting them on notice that termination of employment on this ground is under consideration.”

80. (See *Simon Mbithi Mbane V Inter Security Services Ltd* (2018) eKLR, *Joseph Nzioka V Smart Coatings Ltd* (2017) eKLR and *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR among others.)
81. These authorities are consistent that the employer must demonstrate the steps taken to have the employee resume duty and make him or her aware of the impending termination of employment if the employee does not resume duty.
82. In the instant case, the Claimant testified that he formed a fellowship not a church, evidence RWI refuted and maintained it was a church by the name Cornerstone. This would appear to suggest that the Claimant had already decided not to return on 4<sup>th</sup> October, 2020.
83. More significantly, the Claimant confirmed on cross-examination that the Respondent wrote to him requesting him to return to work but he declined and did not do so thereafter.
84. According to the Claimant, he was on leave yet he adduced no evidence as to when and how he applied for leave and when it was granted by the DCC.
85. RWI confirmed that the Claimant did not apply for leave in person.
86. Even assuming he was on leave, he ought to have responded to the Respondent’s letter by stating so.
87. The Respondent’s letter to the Claimant dated 3<sup>rd</sup> November, 2020 is unequivocal that the Claimant deserted the workplace and abandoned the people he was serving without notice and started a fellowship as evidenced by his letter dated 14<sup>th</sup> November, 2020, to the General Overseer of Cornerstone Christian Church applying for Ministry Affiliation Cover and undertaking to abide by *the Constitution* of that church.
88. The Claimant’s admission that he declined to resume duty, created a fellowship coupled with the letters from the Respondent is cogent evidence that the Claimant had not only made the decision to leave but had already done so.
89. For these reasons, it is the finding of the court that the Respondent has demonstrated that the Claimant deserted the workplace.

## **Reliefs**

90. Having found that the Claimant was not constructively dismissed by the Respondent and having further found that the Claimant deserted the workplace, the Claimant is neither entitled to the declaration sought nor the 12 months compensation.
91. Having found that the Claimant deserted the workplace, the claim for salary in lieu of notice is not sustainable and is dismissed.
92. As regards the salary from November 2020 to 8<sup>th</sup> September, 2021, this is a claim for anticipatory earnings which the Claimant did not establish entitlement to.
93. By the beginning of November 2020, the Claimant had already deserted the workplace and confirmed as much on cross-examination. The claim is dismissed.
94. In the upshot, the Claimant has failed to prove his case against the Respondents and it is accordingly dismissed.



95. Parties shall bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

