



Otachi v Board of Trustees, Nairobi Pentecostal Church Woodley Campus & 2 others (Cause 897 of 2017) [2022] KEELRC 1644 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1644 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 897 OF 2017**

J RIKA, J

MAY 27, 2022

BETWEEN

AMBROSE MOGAKA OTACHI CLAIMANT

AND

**BOARD OF TRUSTEES, NAIROBI PENTECOSTAL CHURCH WOODLEY
CAMPUS 1ST RESPONDENT**

**BOARD OF TRUSTEES, CHRIST IS THE ANSWER MINISTRIES WOODLEY
ACADEMY 2ND RESPONDENT**

**BOARD OF TRUSTEES CHRIST IS THE ANSWER
MINISTRIES 3RD RESPONDENT**

JUDGMENT

1. The Claimant filed his Statement of Claim on 12th May 2017. He states that at all material times, he was employed by the 1st Respondent, as a Messenger, from January 2002.
2. His salary was Kshs. 3,000 from the beginning, which was later improved to Kshs 6,000 from January 2014, to the date of dismissal.
3. The 1st Respondent is now registered as Christ is the Answer Ministries, incorporating the 2nd and 3rd Respondents.
4. The Claimant avers, he was never registered with the N.S.S.F and the N.H.I.F. No contributions were remitted by the Respondents on his account. He never went on annual leave and his salary was grossly underpaid.
5. His contract was terminated on 30th January 2015, without notice or cause. He prays for Judgment against the Respondents for: -



- a. 1-month salary in lieu of notice at Kshs. 9,780.
 - b. Service pay at Kshs. 33,300.
 - c. Annual leave at Kshs. 46,620.
 - d. House allowance at Kshs. 119,700.
 - e. 12 months' salary in compensation for unfair termination at Kshs. 72,000.
 - f. Underpayment of salary from May 2003 to April 2004 at Kshs. 10,860.
 - g. Underpayment of salary from May 2004 to January 2015 at Kshs. 295,977.
 - h. Costs.
 - i. Interest.
 - j. Any other relief.
6. The Respondents filed their Statement of Response on 18th August 2017. They concede the description of the Parties. It is denied that the 1st Respondent employed the Claimant, in January 2002. He was not earning the salary claimed, at Kshs. 3,000 initially and Kshs. 6,000 as of the time he left. The Respondents deny all else. It is contested that the Respondents have capacity to sue and be sued. The Respondents state, they would raise this point on preliminary objection. No preliminary objection was however raised.
 7. It is explained further that the Claimant was a Volunteer who assisted Schoolchildren to cross the road in the morning and in the afternoon. The Parents paid him a stipend for the role. He was not paid a salary by the Respondents as stated. He was required to keep a record of the Children who crossed the road, so as to enable the Parents to compensate him.
 8. The School eventually felt that because the Claimant was informally engaged, he could turn into a security threat. He was therefore asked to leave. He was not an Employee of the Respondent, and is therefore, not entitled to the remedies claimed. The Respondent prays for dismissal of the Claim, with costs.
 9. The Claimant, and the Principal Citam Schools Woodley, David Omtunga, gave evidence for the respective Parties on 20th January 2022, and rested the hearing. The Cause was last mentioned on 25th February 2022, when Parties confirmed the filing and exchange of their Closing Submissions.
 10. The Claimant adopted his Witness Statement and Documents in his evidence. He reiterated that he worked for the Respondents' School, Church and Catering Unit. He was initially a messenger. In January 2015, he was advised by the Administrator Gladys, that his work was finished, because the Respondents wanted to employ fresh and skilled Employees. He reiterated that he was denied employment benefits as pleaded, and that his contract was terminated without notice and/ or just cause.
 11. Cross-examined, he told the Court that he was employed by Woodley Academy. He was not issued a letter of employment. He made a formal application for employment. He did not have a copy. He was aware that the Respondents had a human resource office based at Parklands. He was employed by the School Principal. He received recommendation letter from the Principal, Ms. Marima. It is dated 1st October 2008. It does not show that the Claimant worked from 2002. The letter of termination does not show that he worked from 2002. He was initially paid Kshs. 150 daily, by the Administrator.



12. He asked the Respondents to regularize his employment. He reported to work at 6.00 a.m. and helped Respondents' Schoolchildren cross the road. He did the same at the end of the day at 6.00 p.m. In between, he carried out general duties. The letter dated 4th March 2015 from Gladys stated that the Claimant was Respondents' Employee. He was not issued a pay slip. The Church and the School are in the same compound. He was a member of the Church from the date he was employed. He was a worshipper there, but did not know if he a registered member. The Church has volunteers. David was the Deputy Principal. He did not employ the Claimant. It is not true that the Claimant merely assisted the Children cross the road. It is not true that he was paid by the Parents. He was not in the Respondents' Staff Pension and Medical Schemes. There was no staff uniform. The Claimant did not work for other Employers. He was a graduate of form 4. He seeks service pay in accordance with the law. Annual leave was concurrent with the school vacation. During weekends, the Church and the Catering Unit needed a messenger. The Respondents comprised one campus, as stated in the letter from Gladys. The Claimant engaged the human resource office. He was not told that the Parents were to pay his salary. Redirected, the Claimant restated that he was an Employee, not a Volunteer. Gladys confirms the date of employment and termination. It was for the Respondent to supply a written contract.
13. The Principal David Omtunga likewise adopted his Witness Statement. He joined the School in 1993 as a Teacher. In 2002, he was the Deputy Principal. He was transferred to Buru Buru, becoming the School Principal. He returned to Woodley as Principal, in 2016 where he served to-date. He came to know the Claimant, before he left for Buru Buru. The Claimant assisted Schoolchildren cross the road, on the instructions of the Teachers' Parents Association. They contributed money to a fund. The Claimant was paid stipends from this fund, through the School. The kitty was managed by the School Administrator. The Claimant was not employed by the Respondents formally. It was more of voluntary service. There was no advertisement and no application. Respondents' Employees were uniformed. Cleaners wore navy blue, while Gardeners were in overalls, until these services were outsourced. All Employees were administratively under David. The Respondents have a central structured staff recruitment system. Positions are advertised. Units have no capacity to employ individually. The Claimant was not recruited following this process.
14. Cross-examined, David told the Court that the documents exhibited by the Claimant, are all signed by Respondents' officers. David's evidence was that the Claimant was a messenger. The letter by Gladys dated 4th March 2015, states that the Claimant had been a messenger. He helped the Children cross the road, from 2002 to 2015. A letter from the former Principal, Ms. Marima, dated 1st October 2008, called for the Claimant's personal details. It did not assign the Claimant additional duties. He was given authority to drive Respondents' vehicles. He was paid from Parents' kitty. There is a procedure for hiring staff. Employees would receive contracts and pay slips. All the Employees would be recruited following the same structures. There are no documents showing that the Claimant was a Volunteer. David had been at the School from 1993. The Claimant had been working from 2002 to 2015, according to other offices.
15. Redirected, David told the Court that the Claimant's main role was to help Children cross the road. Other duties were assigned because of his availability. He was never employed formally. He was assigned roles as a member of the Church.
16. The issues are: whether the Claimant was an Employee of the Respondents, or a Volunteer; whether, if in the affirmative, his contract was terminated fairly by the Respondents; and, whether he merits the remedies claimed.



The Court finds:-

17. On 1st October 2008, the Principal of the Respondent's Woodley Academy, wrote to the Claimant, giving him authority to drive their vehicles. They asked him to forward copies of his personal documents to their human resource office. He was cautioned that authority to drive, did not mean he was being promoted to a full time driver.
18. The letter confirms that as of this date, the Claimant was already an Employee of the Respondents. One does not promote, or caution a stranger about promotion. There would have to be some pre-existing employment relationship. Secondly, the letter mentions that the Respondents had noted that the Claimant had put effort in learning how to drive, and that he held valid driving licence. This would suggest that the Claimant, and the Respondents were in an ongoing employment relationship, where the Employer was monitoring the progress made by its Employee in learning how to drive, before authorizing him to drive its vehicles.
19. A letter of recommendation, dated 4th January 2012, addressed to 'whom it may concern,' authored by the School Administrator, states that the Administrator, had known the Claimant for years. It explains the multiple roles, which the Claimant discharged. He was a receptionist; he took care of donations, disbursements and allocations; he organized church meetings; and photocopied church documents, in preparation of church meetings. The letter restates that the Claimant was a qualified driver. This letter issued under the banner of Christ is the Answer Ministries.
20. This was followed by another recommendation letter dated 28th March 2014, this time from Deputy Senior Pastor of the Ministries, Grace Bukachi, addressed to the Claimant. The Pastor refers to the Claimant as a Lollipop Man, who helped the Children cross the road, while serving as messenger in between, serving the Church and the School. The letter states, the Respondents were grateful for the Claimant's service.
21. Gladys Some rounded off these series of letters, acknowledging the Claimant as an Employee of the Respondents, in her letter of 4th March 2015, addressed to "whom it may concern." It described the Claimant's job to comprise the same roles described in the Principal's letter of 1st October 2008. Crucially, Some disclosed in this letter, that the Claimant "has been with us, since 2002 to February 2015."
22. The Academy conferred the Claimant with a Certificate of Appreciation, dated 10th April 2014.
23. The Court is convinced that these letters and Certificate, issued in the context of an employment relationship.
24. The mode of recruitment of Staff, adopted by the Respondents, is not relevant in the proceedings. It is irrelevant that other Employee wore navy blue uniforms or overalls. It is not relevant that he was paid from a Parent's kitty. The Principal told the Court that the kitty was administered by the School. An Employee does not become an Employee by virtue of the work apparel he adorns, or by the manner of his remuneration. He does not become an Employee because he saw an advertisement placed somewhere, and applied for the role. The employer-employee relationship is gauged by other well-established legal principles. The Claimant discharged roles assigned by the School and the Church, at the School and the Church, and for the benefit of the business of the School and the Church. He was under the control of the Respondents at the Respondents' premises. He worked upon their instructions, and used their tools of trade. He was an Employee, and the Respondents were his Employers, within the meaning of the terms 'Employer' and 'Employee,' under the common law and the employment and labour statutes.



25. The Respondents were wrong to hold the position, from the inception, that because they did not employ the Claimant, they did not therefore terminate his contract.
26. It is the responsibility of an Employer, under Section 43 and 45 of the [Employment Act](#), to show valid reason or reasons, to justify termination.
27. The Respondents did not discharge this obligation. The Claimant himself states that he was told by the Respondents that they needed new, skilled Employees, and his services were no longer required. They saw the Claimant as a lifelong messenger, without skills, forgetting for instance, that they had appreciated his driving skills a while back earlier, and authorized the Claimant to drive their vehicles. They used the Claimant to multitask, in roles such as messenger, road marshal, receptionist, meeting organizer and driver. In the end, they branded him a Volunteer, who was informally at the Respondents' business, and who after 15 years was feared to be a security threat. The Respondents pleaded that they did not terminate the Claimant's contract, while at the same time, alleging that they told him to leave, because it was feared he would turn into a security menace.
28. The Court is satisfied that the Claimant was an Employee of the Respondents and that the Respondents terminated his contract, and did not prove the reason or reasons, justifying termination.
29. His last salary was Kshs. 6,000 monthly. He claims underpayment of salary, from 2003 to 2015, a period of 12 years. He has not shown what minimum salary was payable to him, through specific Wage Amendment Orders. He did not cite any Wage Amendment Orders, in his Pleadings, Evidence or Closing Submissions, dating back to 2003, to justify his prayers for underpayments. He did not submit about which of the many roles he discharged, underpayment of salary is to be computed.
30. And although the Court has concluded that he was an Employee of the Respondents, it is noted also that he was a member of the Respondents' Church, and appears to have had a common understanding with the Respondents, on his remuneration. He did not write to the Respondents for the entire period of 12 years, complaining about underpayments. Although clearly not a Volunteer, his salary was a matter of consensus between him and the Respondents, whose Church, the Claimant was a member. There is no proof of underpayment of salary.
31. The Respondents have not shown that the Claimant was registered with the N.S.S.F or subscribed to other Social Security Plan. He merits service pay for 13 complete years of service [January 2002 to February 2015]. Adopting the rate of Kshs. 6,000 monthly, is allowed service pay, at the rate of 15 days' salary [Kshs. 3,000] for each of the 13 complete years of service, at Kshs. 39,000.
32. The prayer for notice pay is allowed at Kshs. 6,000.
33. The Claimant conceded that his annual leave coincided with the School vacations. It would not be merited to grant him annual leave days, as he was away, during School vacation.
34. House allowance is declined on the same ground the Court has declined to interfere with the monthly salary, paid to the Claimant. He was in addition to being an Employee of the Respondents, a member of the Church. Employment relationships are dynamic and the Court does not think that as a Church member, the Claimant should claim housing allowance in arrears. He was offered a job, or jobs, on a monthly salary, which he freely accepted, as member of the Church.
35. He worked for 13 years. He was deployed in multiple roles. There was no complaint from the Respondents about his discipline or performance. He received serial commendation and recommendation letters. The Respondents spoke highly of the Claimant in each letter. He expected to go on working, and had been assigned roles of regular nature, such as driving. He did not play any



part, in the Respondents' decision to terminate his contract. He is awarded equivalent of 12 months' salary as compensation for unfair termination at Kshs. 72,000.

36. Costs to the Claimant.

37. Interest granted at court rates, from the date of Judgment till payment is made in full.

In sum, it is ordered:-

- a. It is declared that termination was unfair.
- b. The Respondent shall pay to the Claimant: service pay at Kshs. 39,000; notice at Kshs. 6,000; and compensation for unfair termination at Kshs. 72,000 – total Kshs. 117,000.
- c. Costs to the Claimant.
- d. Interest allowed at court rates from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

