Kamundi v Nilson & 2 others (Employment and Labour Relations Claim E021 of 2021) [2022] KEELRC 4096 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4096 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

EMPLOYMENT AND LABOUR RELATIONS CLAIM E021 OF 2021

DKN MARETE, J

SEPTEMBER 28, 2022

BETWEEN

EUSTACE NDEKE KAMUNDI ..... CLAIMANT

AND

N.B FRIDE NILSON ..... 1ST RESPONDENT

NELSON MUNYI ..... 2ND RESPONDENT

JOSHUA MALANDA ..... 3RD RESPONDENT

JUDGMENT

1. This matter was originated by way of a statement of claim dated June 29, 2021. The issues in dispute are herein cited as;

   a. Unfair termination of employment under the *employment Act*.

   b. Violation of the right of fair administrative action.

   c. Violation right to fair labour practices.

   d. Violation of the right to fair hearing.

2. The 1st respondent in a 1st respondent's response to claim dated July 7, 2021 denies the claim and prays that this be dismissed with costs.

3. The other respondents did not file any defence to the claim.

4. The claimant's case is that on December 18, 2011, he applied for a job of pastoral services in the organization called Faith Homes Kenya through the overseer, Rev Nelson Munyi and a board member of the mission.

5. The claimant's further case is that after submitting all the requirements, including good conduct, professional certificates, academic certificates, NSSF, NHIF, passports size, Identity card, C.V and two references, the 2nd respondent forwarded these for approval by the organisation board headed by Dr. N.B Fride Nilson as Chair.

6. The claimant further avers that upon approval, he was posted to revive the church at Kauthini Faith Homes at Chuka, Tharaka Nithi County as Pastor in Charge. He was issued with an Identity card indicating his office with the organisation on January 1, 2012.

7. The claimant's further case is that his main duties included a revival of the church and registration of Matuntu Primary school, long unregistered and sponsored by the church. He also attended the following church duties in his capacity;

    1. National women conference and adversary for 40 years held at Makutano on August 18, 2012.

    2. National youth conference held at the same place on August 22, 2013.

    3. Pastors and elders seminars held at the same place on April 26, 2014 all were facilitated by the Managing Director who is the chairman of the mission and I was issued with certificate of attendance and confirmation letter.

8. The claimant's further case is that on request for salary payment, the Director disclosed that this would be made after a two years of probation and scrutiny of capability on a scripture mission. When this was over, the claimant requested the Director to visit his church and recommend him for pay but he chose to send two overseers, Rev Munyi and pastor Joshua Malanda - board members, for recommendation on his spiritual duties. This was had and the Director instructed the two to come back and open an account where church monies and his salary would be processed. This was A/C No0210161577038 in the name of Faith Homes of Kenya held at Equity Bank, Chuka Branch on October 18, 2014. The account was operated by the 2nd defendant as overseer and the claimant as pastor in charge and chairman of that church account.

9. The claimant further avers that he invited the director for his two years pastoral service anniversary and this was well received with honouring the invitation and coming with an entourage. They were hosted for three days.

10. The claimant further avers that due to a dispute over the school and its head teacher and an attempt to convert the sponsorship to the PCEA church, the said head teacher and the Assistant thereof organised a mob which overwhelmed him and chased him out of the church in the presence of Rev Munyi. He further avers as follows;

    > That I left my official bag with church documents which were added over to Rev Nelson Munyi and to date has retained the bag, later the culprits were arrested and added over to Chuka Law Court.

11. The Director at the onset set out a peace mission but later became hostile and joined the forces bent on his ouster.

12. The claimant's other case is that he was attacked in the church and the same members advised Rev Munyi to dismiss him and employ another pastor to take charge of Kauthini Faith Homes Church. On such realization he resorted to court and sought orders restricting the employment of another pastor by Rev Nelson.

13. The claimant avers that he has not been paid a cent, despite demand. The respondent merely denies liability and disclaims my appointment to office.

14. He claims as follows;

    i. One months salary in lieu of notice – Kshs 30,000.00.

    ii. Salary arrears for 120 months = Kshs 30,000.00 x 120 = 3,600,000.00.

    iii. Compensation for loss of employment Kshs 3,600,000.00.

    iv. Airtime and NHIF allowances Kshs 100,000.00.

    Total = Kshs 7,330,000.00.

    v. Certificate of service.

15. He prays as follows;

    a. A declaration that the termination of the Rev Eustace Ndeke Kamundi pastor in charge of Kauthini Church was unfair termination, therefore illegal and unlawful.

    b. A declaration that the claimant right to fair labour practises has been breached.

    c. A declaration that the claimant right to fair administrative action has been breached.

    d. Declaration that the claimant right to a fair hearing has been breached.

    e. Payment as calculated above.

    f. Cost of this suit.

    g. Any other orders that the honourable court may deem fit to grant in the circumstances.

16. The 1st respondent's case is a denial of the claim.

17. He denies that the claimant applied for employment and further avers that if this was to happen as alleged, the application would have been to the Board of Directors, Faith Homes and not the respondent as alleged.

18. The 1st respondent's further case is that Faith Homes has a clear procedure for and on employments. This was not followed in the event of this alleged application for employment.

19. His further case is that at one time there arose a dispute between the claimant and the PCEA Church consequent of which he was chased out of the church premises. The claimant thereon requested the Headmaster, Matundu DEB School which was under the management of Faith Homes and was temporarily granted a room to conduct his services while looking for permanent space. This was to be done under the control and supervision of the 2nd respondent.

20. The 1st respondent's further case is that the claimant did not adhere to the terms and conditions between himself and the Headmaster Matundu DEB School relating to his temporary accommodation and was therefore requested to vacate the Faith Homes premises which he voluntarily did.

21. The respondent further avers that any person can attend any seminar or conference on invitation and further avers that if the claimant was so invited, this was ordinary but not as pastor or employee of Faith Homes.

22. The 1st respondent further raises the following points of law in relation to the claim;

a. The claimant's statement of claim is undated and unsigned by the claimant himself and/or his agent.

b. The supporting affidavit is not commissioned and/or not signed at all by the claimant.

c. The aforesaid documents are not received or datestamped by the court to show that they are dully filed in court.

d. The claimant's statement of claim is not verified by an affidavit as required by the law.

23. The respondents in a further response dated August 23, 2021 further denied the claim and prays that it be dismissed with costs.

24. It is their position that the claim is misconceived, bad in law, incompetent, a gross abuse of the process of court, unsustainable and material for dismissal.

25. They also threaten to pursue a preliminary objection on incurability of the claimant's pleadings. This, however, was never effected or pursued.

26. The respondents deny that the claimant's application for employment was approved or that he was given the task of reviving the church at Kauthini Faith Homes as pastor in-charge. They further deny unfair termination of employment and any violations as pleaded.

27. Their further case is that in view of her total denial of the claimant's case, he becomes disentitled to the reliefs sought and no action would lie against them as the claimant was not even their employee.

28. This matter came to court variously until the February 3, 2022 when it was heard.

29. The issues for determination therefore are;

1. Was the claimant ever employed by the respondents?

2. Was the employment of the claimant, if at all, terminated by the respondents?

3. Was the termination of the employment of the claimant by the respondents wrongful, unfair and unlawful?

4. Is the claimant entitled to the relief sought?

5. Who bears the costs of the claim.

30. The 1st issue for determination is whether the claimant was ever employed by the respondents. The parties hold diametrically opposed positions on this.

31. When the matter came for hearing on February 3, 2022, the parties testified in reiteration of their respective cases. They sought to rely on their respective pleadings, witness statements and lists of documents as filed in court.

32. The claimant on cross-examination testified that he had no letter of employment and only relied on identity card which was valid up to December 31, 2018. He also testified that he had an application letter dated December 18, 2011 but agreed that this was not letter of appointment.

33. The claimant further testified that he had a confirmation of appointment signed by the Director of the respondents. He however did not receive any salary but lived on promises of payment of salary. This salary was to be paid through an account to be opened by three people. The account was not personal but a church account.

34. The claimant further testified that he had a letter of employment dated April 24, 2014 but this is now lost. These went with an official of the respondent. The letter is a confirmation of the claimant's appointment as a pastor but not employment with the respondents. His employment is therefore documented and a report prepared by the 2nd and 3rd respondents who have also signed it. This was forwarded to the Director, the 1st respondent.

35. DW1 Fride Nilson testified in reliance to his witness statement and list of documents in support of his case. It is his case that pastors are not employees of the organization. Therefore they are not paid any salary. The claimant was not an employee and therefore a case of illegal termination of employment does not arise.

36. DW2 Joshua Malanda testified that he is a pastor of Faith Homes who lives in Nairobi. He sought to rely on his witness statement dated July 6, 2021 and filed on 21st August instant.

37. DW2 further testified that he is not a director of Faith Homes nor an employer of the claimant. It is his testimony that he has been wrongly brought before court.

38. On cross-examination he testified that he is not the Secretary General of the organization but was a Board Member. Further the report he made was a personal opinion on the issues raised and that he was sent as a pastor to facilitate the opening of the account.

39. DW3 Nelson Mwangi Njeru testified that he was a pastor and resident at Embu. He sought to rely on his witness statement. He further testified that he works for Faith Homes and is in charge of Embu, Tharaka Nithi and Meru Counties where he runs the show in accordance with the Bible and not the *Constitution*.

40. The claimant in his written submissions dated February 24, 2022 submits that he thoroughly answered all issues raised on cross-examination by the respondent's counsel through his appointment letter marked ENK5 per his supporting affidavit at paragraph 5 and annextures marked 1-13 of his memorandum of claim.

41. The claimant submits a case of employment and annexes a letter of offer of employment dated November 18, 2012. This letter stipulates his offer of employment, terms and conditions of such employment, designation and job group, and emoluments payable thereof. This is besides other formalities of such letters of appointment.

42. The claimant in a Further claimant's Written Submissions dated March 28, 2022 references the following documents annexed to his supporting affidavit and written submissions;Application marked ENK1 and dated December 18, 2011.Identification card marked ENK2 dated January 11, 2012.Appointment letter marked ENK5 dated November 18, 2012.Confirmation letter marked ENK5 dated April 24, 2014.Certificate of attendance of pastors seminar and certificate of Faith Homes of Kenya registration No 6216 marked ENK5 dated April 26, 2014.

43. The respondents in their written submissions dated March 24, 2022 reiterate their case of denial of the claim. It is their submission that there was no employer-employee relationship inter partes. Further, the claimant has not adduced any evidence to this extent.

44. It is the respondent's further submission that the allegation of no pay for the claimant is testimony of the absence of a legal relationship between the parties.

45. The respondent's in furtherance of their case sought to rely on the authority of *Public Service Commission & 2 Others –vs- Eric Cheruiyot & 16 Others* 2022 eKLR where the Court of Appeal established itself on issues jurisdiction as follows;

> "44. Our interpretation of the provisions of section 12 of the *Employment and Labour Relations Court Act* in that ELRC Employment and Labour Relations Court has jurisdiction to entertain any dispute or any contemplated dispute under section 12(1) but the dispute between parties must be related to their employment and/or touching on Labour Relations. This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the Court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the Court to entertain a petition premised on the branch of a party's fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matter contemplated under section 12 of the Act. Our view is fortified by the preamble to the *Employment and Labour Relations Court Act*, 2011 which provides that it is.
>
> "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes."
>
> 49. In the absence of an employee-employer relationship, it is our considered view that the Court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact High Court.
>
> 53. Therefore, for want of an employer-employee relationship, we find and hold that the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded that conferred upon it by law, which renders its decision a nullity ab initio."

46. Overall, they submit a case of no liability in the absence of an employment relationship inter partes.

47. The claimant has ably presented and submitted a scenario and case of employment as pastor of Faith Homes of Kenya. He has further testified to a case of employment and annexed documents in such support.

48. The claimant has further adduced evidence and support documents on his liaison and relationship with his employer organization. This includes his management of their church(es) and school in Tharaka Nithi County under the supervision of pastor Munyi who was the regional head of the church.

49. The claimant has also figuratively demonstrated the source of his misfortune in the course of his duties as such pastor. This is in the confrontation between the PCEA denomination and church and himself on behalf of Faith Homes, Kenya in which he was abandoned by his own. This led to his being ostracised and ousted from duty.

50. The respondents do not deny the claimant's place as a pastor. They only deny that he was an employee or was even employed by their organization. It is their case and submission that pastors in their organization are not employees or even paid a salary. They are not clear on how their pastors would take up appointments and go unpaid. This was not a monastery or so this court believes. All work is intended to be compensated by pay, emoluments or other means of incentives to the worker. This is the essence of work. It enhances contention and self-worth of individual employees. At the same time,

it sustains their livelihoods through pay for work done. The respondents failed in both their pleadings and respective cases and evidence to satisfy the allegation of non-payment of a salary in the midst of the plea of the claimant.

51. In any event, the claimant had tendered evidence of a duly executed contract of employment indicating his monthly salary as Kshs 38,600.00.

52. This matter tilts in favour of the claimant's employment by the respondents. He has adduced overwhelming evidence of employment and tendered documents in such support. The respondents have failed to controvert this and only dwell on denial of the claim.

53. It is not likely that the claimant would come out with such a succinct and demonstrated case of employment, relationship and liaison with the respondents on a fictitious note. This cannot be tell-tale. It is real and substantially so.

54. The claimant has established a case of employment on a preponderance of evidence and a balance of probabilities. I therefore find a case of employment of the claimant by the respondents.

55. The 2nd issue for determination is whether the employment of the claimant, if at all, terminated by the respondents. The claimant's case is that this is the case whereas the respondents deny termination, or at all.

56. The claimant's case and submission is that after the PCEA, Matuntu School confrontation involving him, the local community and Faith Homes, he was dishonourably chased away and rendered out of work and employment. Not even involvement of his employer ministry salvaged the situation as these became hostile and took sides with the enemy. He was ostracised. He was not facilitated to return to his office and employment. This is a case of constructive termination of employment only denied by the respondents. I therefore find a case of termination of the claimant's employment by the respondent.

57. The 3rd issue for determination is whether the termination of the employment of the claimant by the respondents was wrongful, unfair and unlawful. Having established a case of termination of the employment of the claimant, the next issue is the determination of its validity, morality and legality. The circumstances of the termination of employment have been hitherto illustrated and are as clear as daylight. These obviously illustrate a case of wrongful, unfair and unlawful termination of employment. I therefore find that the employment of the claimant was wrongly, unfairly and unlawfully terminated by the respondents to his loss.

58. The 4th issue for determination is whether the claimant entitled to the relief sought. He is. Having succeeded on a case of unlawful termination of employment, he becomes entitled to the relief sought.

59. The sub-issue arising here is the amount of award the claimant is entitled to. He claims salaries for a period of 120 months. The big question is whether all this time from January, 2012 to-date, he has been in the employment of the respondent.

60. The claimant's case and testimony is that on 7th December, 2015 he was assaulted and chased away from the church compound. Initially, there was some intervention from Pastor Munyi, the regional Overseer who ultimately became hostile and took sides with the enemy. Thereafter, the claimant was not party to the respondent's affairs or assignments. I find that the termination of the employment of the claimant ensued at this period and hold as such. The claimant therefore is not entitled to any salaries for subsequent periods after this debacle and confusion.

61. I am therefore inclined to allow the claim and order relief as follows;

i. A declaration be and is hereby issued that the termination of the Clamant as pastor in charge of Kauthini Church was wrongful, unfair and unlawful.

ii. A declaration be and is hereby issued that the claimant's right to fair labour practises has been breached by the respondents.

iii. A declaration be and is hereby issued that the claimant's right to fair administrative action has also been breached by the respondents.

iv. A declaration be and is hereby issued that the claimant's right to a fair hearing has been breached by the respondents.

v. One(1) months salary in lieu of notice 38,600.00

vi. Salary arrears for forty-eight (48) months

(January 2012 – December 2015)

(Kshs 38,600.00 x 48) 1,852,800.00

vii. Twelve (12) months compensation for unlawful termination

of employment 463,200.00

Total of claim ..... Kshs 2,354,600.00

viii. The costs of the claim shall be borne by the respondents.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF SEPTEMBER 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Rev Ndeke, claimant in person.

2. Mr. Mwiti instructed by Joshua Mwiti Law Advocates for the respondent.