



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 390 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**CHRISTOPHER KINAMA MUTUNGA.....CLAIMANT**

**VERSUS**

**NENO EVANGELISM CENTRE THROUGH**

**ITS REGISTERED TRUSTEES.....RESPONDENT**

**JUDGMENT**

Vide his Statement of Claim dated 22<sup>nd</sup> February 2017 and filed on 24<sup>th</sup> February 2017, the claimant herein avers that the Respondent unfairly and unlawfully terminated his employment Contract.

The Claimant avers that he was employed by the Respondent until his unlawful termination on 25<sup>th</sup> January 2017.

The Claimant contends that the termination was illegal and unfair and in breach of Section 45 of the Employment Act as no valid reason was given by the Respondent at the time of summary dismissal.

In the claim, he is seeking the following reliefs:

- i) A declaration that the summary dismissal of the claimant by the Respondent amounts to unfair termination or unlawful dismissal
- ii) An order that the Respondent do pay the claimant
  - Leave pay from 2007 to January 2017 Kshs.135,000
  - Service pay for every year worked Kshs.150,000
  - Damages for unlawful dismissal equivalent to 12 months' pay Kshs.180,000
  - NSSF refund Kshs.3,200
- iii) An order that the Respondent do issue the claimant with a certificate of service.
- iv) Costs of the suit

The Respondent, Neno Evangelism Centre through its registered trustees filed its Memorandum of Appearance on 24<sup>th</sup> March and Statement of Response on 3<sup>rd</sup> April 2017 where it denied the claimant's allegations in toto.

**Claimants Case**

The claimant in his witness statement dated 21<sup>st</sup> February 2017 avers that he was employed by the respondent in the year 2007 where he worked as a caretaker. His starting gross pay of was Kshs.8,000 and increased to Kshs.15,000 per month by the time he

left employment of the Respondent.

The Claimant further avers that on 24<sup>th</sup> January 2017, he received a call from the Director of the Respondent, Pastor Nganga who instructed him that on 25<sup>th</sup> January 2017, he would work at the canteen and would be in charge of cash collection. He further avers that on the said Wednesday the 25<sup>th</sup> January 2017, he reported to work at 5:30 Am and worked at the park and at the canteen. That since the newly appointed car park attendant lacked a driving licence, he had to work at both the car park and the canteen.

The claimant further avers that following friction between him and the new car park attendant on who should collect parking fees, he reported to the manager who convened a meeting but failed to give a solution.

The claimant further avers that at around 9:52 pm, the Director called him and demanded to know why he had not heeded to the Director's instructions to personally collect the money. That he replied that the cashier had insisted that she was in charge of the cash collection and that they had sought the manager's intervention on the matter to no avail. That the director rejected the explanation and angrily told him that he had been sacked.

The claimant also claims that the Respondent deducted a total of Kshs.3,200 which was to be submitted to NSSF but the same was never remitted.

To support his case, the claimant annexed an Employment Contract, Mpesa message, messages allegedly sent by Apostle Nganga, a demand letter and a provisional NSSF statement.

### **Respondents Case**

The respondent via Neno Evangelism Centre responded to the claim via a statement of Response dated 30<sup>th</sup> March 2017.

In the response, the respondent denies the claimants averments in toto.

The Respondent further denies that the claimant's salary had graduated to Kshs.15,000 at the time of termination and puts the claimant to strict proof thereof. The Respondent also denies a call was made to the claimant instructing him to work at the canteen as a cashier. It further denies the existence of a new parking attendant and aver that no meeting took place on the 25<sup>th</sup> January between the manager and the claimant as alleged.

The respondent avers that being a church, it has a proper channel

of dispute resolution. That the claimant had collected parking fees for a number of days but refused to submit the money to them despite several calls from the director. That consequently the respondent sent a letter to the claimant warning him that if he failed to submit the parking fee he had collected, it would find his replacement.

The Respondent avers that after the above incident, the claimant never showed up for work with no lawful explanations. It denies failing to remit the claimant's NSSF payments.

In summary, the respondent maintains that there was a valid reason for termination. It prays that the claim be dismissed with costs.

Upon request by the claimant, the court directed the parties to proceed by way of pleadings, affidavit, evidence and submissions. By the time of delivering this judgment, the claimant had filed his witness statement and submissions while there is no statement from the Respondents. The Respondent however filed written submissions.

### **Claimant's Submissions**

In his submissions, the claimant through his counsel maintained that the summary dismissal by the respondent was unfair and unlawful as it was done contrary to the provisions of Section 43 of the Employment Act. He submits that he was neither given the reasons for his termination nor accorded an opportunity to respond to any allegation against him. That the dismissal was callous, malicious, insensitive and inhuman.

The Claimant's counsel submits that the claimant dutifully, selflessly and with a lot of dedication performed his duties for seven years until his employment was terminated without any prior warning, notice or opportunity to respond to any allegation against him.

The counsel submits that the claimant had not committed any misconduct that warranted a summary dismissal. He relies on Sections 41, 43 and 44 of the Employment Act to buttress this point. He also relies on decisions in **Court of Appeal at Nairobi Civil Appeal No 108 of 2015 Nation Media Group Limited and Onesmus Kilonzo** and **ELRC Cause No. 536 of 2014 Jaffar Mohammed v Ready Consultancy Company Ltd.**

He submits that the claimant has proved his case on a balance of probability and prays that his claim be allowed as prayed.

### **Respondent's Submissions**

The respondent's counsel submits that the claimant was summarily dismissed in accordance with section 44 of the Employment Act.

Respondent's Counsel submits that notwithstanding the fact that the respondent was within its right to dismiss the claimant summarily, being a religious organisation, it offered the claimant a chance to redeem himself by offering an explanation on the amounts of monies collected at the car park.

The Respondent's counsel further submits that the respondent directed the claimant to work at the canteen but in a blatant disregard the claimant insisted on working at the car park. Counsel further submitted that the summary dismissal was lawful and urged the court to be guided by the reasoning in **Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital**. Further that the right to be heard does not only entail an oral hearing as was held in **R v Immigration appeal Tribunal ex-parte Jones (1998) IWLR 477,481**.

Lastly, the Respondent's counsel submits that the claimant was the architect of his own misfortune and that his actions and/or inactions triggered and necessitated the resulting summary dismissal.

On whether the claimant is entitled to the reliefs he is seeking, the Respondent's counsel urged the court to be guided by the case of **Erick Karanja Gikonyo & Another v Samson Gathimba (2011) eKLR**. he prayed that the claim be dismissed with costs.

### **Determination**

Having carefully considered the pleadings, evidence, submissions and authorities cited by the parties, I find the issues for determination are: -

- i) Whether the termination of the claimant's employment by the Respondents was wrongful, unfair and unlawful.
- ii) Whether the claimant is entitled to the reliefs sought.

### **Whether the termination of the claimant's employment by the Respondents was wrongful, unfair and unlawful**

The claimant contends that he was unfairly dismissed by the Respondent and was never given an opportunity to defend himself. On the other hand, the respondent maintains that the summary dismissal was triggered by the fact that the claimant failed to submit money he had collected. Further that the respondent offered the claimant the chance to redeem himself via a letter allegedly sent to him.

As such, I am presented with two distinct versions on what led to the claimant's dismissal and how it was effected.

In paragraph 8 of the Respondent's Statement of response, the Respondents state as follows:-

*"...a call was never made to the claimant on Tuesday, 24<sup>th</sup> January 2017 instructing him to work at the canteen as a cashier as alleged as the claimant does not meet the qualifications to work in that position."*

Later on, the Respondent in paragraph 11 of his submissions states:-

*"The respondents subsequently appointed the claimant to work at the canteen, however in blatant regard (sic) to the respondents lawful and proper command within his scope of duty to obey, he still insisted once on working at the car park..."*

These statements are contradictory. I also take note of the explanation advanced by the Respondent that after making numerous calls, it sent the claimant a letter giving him a chance to be heard and redeem himself. I have carefully perused the said letter. It is dated 18<sup>th</sup> November 2016. As indicated in the pleadings, the events that led to the claimant's termination occurred on 25<sup>th</sup> January 2017. With utmost respect to Apostle James Nganga, the author of the said letter, I am not convinced that it was humanly possible for him to predict that such events would take place and write the letter in advance.

Accordingly I dismiss the Respondents' version and find that the Claimant's version is more plausible. Specifically, I am convinced that: -

- i) The claimant was not informed of the respondent's intention to dismiss him.
- ii) The claimant was not given a chance to defend himself.

I must now address the submission by counsel for the respondent that a hearing is not necessary in summary dismissals. Section 41 of the employment Act Provides as follows:

*"(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."*

It is trite law that the burden of proof of a sufficient reason for termination lies with the employer. Section 43 of the employment Act Provides as follows

*“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”*

As such the onus was on the Respondent to prove that there existed sufficient reasons for termination. The authority cited by the Respondent does not relate to the law in Kenya at the time the claimant’s employment was terminated is therefore not relevant.

In the case of **Loice Otieno v Kenya Commercial Bank Limited Cause No 1050 of 2011** Radido J. stated that whether an employee had been given warnings in the past or not, where an employer is contemplating terminating the services of the employee, it has to expressly and unambiguously inform the employee of the contemplated action and further that fundamental breach of the employment contract/obligations or gross misconduct could not be resorted to without complying with procedural fairness/natural justice. An employer who summarily dismissed an employee without a hearing runs afoul of Section 41(2) of the Employment Act.

In the instant case, the Respondent did not file a witness statement and as such the allegations of the claimant remain uncontroverted. The Respondent did not inform the claimant of the intention to terminate the contract nor did it give the claimant a chance to defend himself. Accordingly, I find that the termination was unfair and unlawful.

#### **Whether the claimant is entitled to the reliefs sought**

The claimant prays for leave pay. Section 28 of the Employment Act, 2007 gives every employee a right to take annual leave. A duty is imposed on the employer to ensure that every employee has taken annual leave as and when it is due. The respondent has not produced any proof not filed to dispute this. Accordingly, the prayer

for leave pay is allowed.

The prayer for damages for unlawful dismissal also succeeds. Having worked for the respondents for seven years and taking into account the manner in which the Respondent handled the termination, I award the claimant 12 months’ salary at Kshs.15,000 as compensation for the unfair termination. I have used this figure as the Respondent did not adduce any evidence to prove that this was not the claimant’s salary at the time of termination of his employment.

The claimant is also awarded the refund of NSSF deductions to the tune of Kshs.3,200 that were deducted but never remitted.

The claimant prayed for service pay. However, it is not in dispute that his employer had enrolled him in NSSF scheme. Thus the claimant is not entitled to service pay.

I thus award the claimant a total sum of **Kshs.304,354** made up as follows:-

1. Pay in lieu of leave Kshs.121,154
2. Compensation for unfair termination Kshs.180,000
3. NSSF Refund Kshs.3,200

**Total Kshs.304,354**

The Claimant be issued with a certificate of service as provided under Section 51 of the Employment Act.

I award costs to the claimant together with interest from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2021**

**MAUREEN ONYANGO**

**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.

**MAUREEN ONYANGO**

**JUDGE**