



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRC.C/62/2017**

**CITATION: HM VS MUSLIM ASSOCIATION**

**JUDGMENT**

1. The Claimant averred that he was employed by the respondent on 14th February, 2000 as a Muslim Cemetery caretaker at a monthly salary of Ksh.3,000/= which he considered as underpayment.
2. From 14th December, 2002 his salary was increased to kshs. 6,000/= owing to undertaking extra duties of teaching at the respondent's Madrasa in the Jamia Mosque compound.
3. On 11th February, 2012 the Claimant was relieved from his duties as Madrasa teacher and assigned extra duties of maintaining security at the respondent's cemetery.
4. The Claimant alleged that he served the respondent with dedication without any warning until the date of his unfair termination from service by the respondent on 6th June, 2015 without any lawful reason.
5. The Claimant alleged that the respondent terminated his service on allegation of gross misconduct and disgrace to his family. The particulars of the allegation were never availed to him. Further that no notice to show cause was issued and that he was never accorded an opportunity to be heard before the termination of his service.
6. The Claimant further averred that owing to the termination of this service he then claimed his terminal benefits which he itemized in the statement of claim.
7. The respondent in its statement of response averred that the Claimant was employed as alleged and was paid a salary of Kshs. 3,000/= per month but denied the Claimant was underpaid. Further the Claimant in his employment was required to abide by Islamic teachings and conduct himself respectfully in accordance with Islamic religious beliefs.
8. The respondent admitted that the Claimant's salary was increased from Kshs. 3,000/= to Kshs. 6,000/= and later on to Kshs. 8,000/= but denied the Claimant was added extra duties of teaching at the Madrasa in the Jamia Mosque. The respondent further alleged that the Claimant was employed on part time basis and that the Claimant was only needed for a maximum of three hours per day and only when there was need.
9. The respondent further alleged that the Claimant was allowed to farm  $\frac{3}{4}$  acres on the Cemetery land on which he planted maize and beans for his own consumption. The Claimant further harvested fruits from the cemetery land earning more than Kshs. 10,000/= per harvest.
10. Further the respondent offered the Claimant a house with a rental value of Kshs. 15,000/= per month at the cemetery compound. The respondent further alleged that the Claimant was paid 2,000/= for each grave dug and between 1000 to Kshs. 3,000/= for washing male corpses. These payments were made by the bereaved families.
11. The respondent further averred that the Claimant was issued with a show cause letter dated 4th April, 2015 and 30th April, 2015 respectively. Further that the termination on 6th June, 2015 was for lawful reasons as the Claimant contravened clause 7 of his letter of appointment dated 14th February, 2000.
12. The Claimant was informed of the particulars of his gross misconduct and given a chance to respond in writing and apologize which he failed to do. The gross misconduct was adultery with a wife of a Muslim adherent which was a gross violation of Islamic laws and beliefs.
13. Concerning leave, the respondent averred that no leave accrued and that the claimant at times went for more leave days on weekly basis. Further that the Claimant never worked overtime as the Claimant's work was not on a full-time basis and was fully paid for his services

whenever he worked.

14. At the hearing the Claimant relied on his statement recorded on 16th December, 2016 as his evidence in chief. It was his evidence that his salary at the time of termination was Kshs. 8,000/=. In 2012 he was returned to full time work at the cemetery and given security duties. The teaching stopped. He further stated that he was resident at the cemetery and that in 2012 his salary was Kshs. 10,000/= and was paid until the time of his dismissal. It was his evidence that he was not given reason for being stopped from working. He however stated that he had family problems and that his wife made a report to the respondent about it.

15. A Mr. Abdullahi called him to the office and told him the elders wanted to see him. He met the elders and they told him his wife had raised questions and the issue had been discussed and it was decided that he writes an apology letter but a Mr. Swaleh told him that if he had made a mistake, he should write an apology and if not, there was no need for an apology. It was his evidence that he had no prior notice of the meeting. He was given until the next day to give his letter. He never wrote the apology letter as it had no basis.

16. He was therefore issued with a termination letter on 6th June, 2015. The letter alleged that on 3rd April, 2015 he had misbehaved and disgraced his family. He however denied any wrongdoing.

17. It was his evidence that upon termination, he wrote to the respondent, committee on 3rd August, 2015 and on 20th August, 2015 seeking to be paid his terminal dues before he could vacate the respondent's premises.

18. In November, 2015 the respondent called him and asked him to compute his dues. No agreement was reached over his dues and was asked to vacate the respondent's premises.

19. He denied he violated Islamic tenets contained in clause 7 of his appointment letter. According to him AK was his wife and they had one child and that in Islam one was allowed up to four wives.

20. Before marrying Asha he sought permission from his 1st wife's father. He came to him they discussed and he gave his blessings to marry Asha. He further informed his 1st wife about his 2nd wife. He denied committing adultery. On payment of dues, he denied receiving Kshs. 75,000/=. He further reiterated that the respondent underpaid him and that they never remitted his NSSF and NHIF dues.

21. Concerning working hours, it was his evidence that he was resident at the cemetery and that deaths occurred at any time and he had to remain at his place of work to accept the bodies and keep them. Some could be brought late at night.

22. In cross-examination he stated that he was a Muslim and that paragraph 7 required him to adhere to Islamic law and practices. His working hours were from 6.00 am to 9.00 p.m. but death could occur any time and he would be called. In Islam burial takes place at any time even at night. It was his evidence that he cleaned bodies, dressed them, dug graves and performed final rites before burial. Further that during Friday prayers he could lead the same if the Imam was not present. He further stated that adultery was a great sin in Islam.

23. The respondent claimed his wife Aisha complained that he had committed adultery but this was not explained to him. He had no notice of the offences he had allegedly committed. According to him, he was married to AK at that time and it was not an offence. He denied his wife found him committing adultery.

24. It was his evidence that his 1st wife Aisha wanted to beat A after rumours that he was committing adultery but this was out of jealousy and not based on evidence.

25. The respondent's witness Mr. Abdi Jamaa stated that he was a transporter and hotelier. It was his evidence that the Claimant worked for the respondent as a cemetery caretaker. He was the respondent's treasurer at the material time. He recorded his witness statement on 3rd April, 2017 which he adopted as his evidence in chief. He also relied on documents filed with the claim.

26. In cross-examination he stated that he understood the procedure for termination of employment and that the Claimant was issued with notice of termination of employment and that there was notice to show Cause. The Claimant received the show cause letter.

27. According to him the Claimant was to be paid but an issue arose between him and his 1st wife who demanded equal division of his dues because the Claimant and the wife were not living together. The Claimant therefore refused to take the money. It was his evidence that the Claimant was terminated on account of adultery and that the cemetery was next to the mosque and that the Claimant lived there with his wife. The one they knew. The wife approached them and said the Claimant was no longer sleeping at home. The Claimant however said he accused by his wife for teaching children of another woman. The matter was investigated and the father of the lady was called and he denied knowledge of the affair between his daughter and the Claimant.

28. He however asked for more time to resolve the matter. The lady was also called and asked if she had an affair with the Claimant and she denied. The Claimant was all the same cautioned that under Islam no man was allowed to enter the house or greet a woman who was not his wife.

29. The Claimant's wife and her sister later went to woman's house at night and beat her up. The woman reported the matter to the police and the Claimant's wife was arrested.

30. It was his evidence that the Claimant was issued with a letter of appointment and that the letter did not provide or import tenets of Koran. The Claimant was however supposed to observe discipline in accordance with Islamic Law.

31. This claim presents a unique situation of the relationship between religious faith and canons thereof and the provisions of Employment

Act regarding discipline of employees.

32. The Claimant alleges he was unfairly terminated by the respondent. He however did not seem to strongly deny the reason for which he was terminated. Initially he denied knowledge for the dismissal but later conceded that he was accused engaging in an adulterous relationship with one AK. According to Claimant however, A was his second wife having married her in accordance with Islamic Law which permitted marriage of up to four wives. The Claimant sought the consent of A's father who gave his blessings. The respondent's committee on the other hand disputed such marriage and stated that they enquired from Asha's father who denied knowledge of such marriage further that Asha as well denied any such marriage.

33. The Claimant conceded that he was bound by the tenets and principles of Islam which regarded adultery as a very serious offence and further one was not allowed to shake hands or enter the house of any woman except his wife.

34. Clause 7 of the Claimant's contract of Employment provided that the Claimant was expected to observe strict discipline and good conduct and public relations in and outside his place of work in accordance with the teachings of Islam.

35. The Claimant did not deny intimate relationship with AK. He however justified such relationship on account of marriage. He did not call any witness or produce any evidence in support this allegation. He was called upon by the respondents committee to defend himself against accusations of adultery but opted not make any response or apology because in his view the relationship with Asha was lawful as the latter was his wife.

36. As observed earlier the Claimant neither called any witness nor produced any evidence to support his claim the AK was his wife.

37. Clause 7 of the Claimant letter of appointment provided that any gross misconduct would result in disciplinary action being taken against him including summary dismissal. The Claimant acknowledged that adultery was a serious offence under Islamic Law hence when he failed to prove that his relationship with A was lawful the respondent was justified in terminating his service on that ground.

38. Concerning terminal dues, the Claimant has put forward a claim for overtime but never specified the times he considered working overtime.

39. The Claimant resided at the cemetery compound. He never pleaded or alleged the nature of his work entailed working more than statutory working hours. This claim will therefore be disallowed.

40. Regarding underpayment the Claimant did not produce the relevant wage order showing how much employees of his calibre were to paid to enable the Court compare with what he was actually paid to verify if indeed there was any under payment. This claim will also be disallowed.

41. The respondent did not deny the Claimants' allegation that he was not registered for N.S.S.F.

Further the respondent did not produce any evidence to dispute the claim that Claimant never went on leave during the period he worked.

42. In conclusion the Court will award the Claimant as follows: -

(i) Leave (2002 – 2015 at one month's salary per year 104,000

(ii) Service pay at the rate of 15 days pay for each Complete years of service. 52,000

Total. 156,000

(iii) Costs of the suit

This award shall where applicable attracted applicable taxes and statutory deductions

It is so ordered.

**Dated at Eldoret this 12th day of May, 2021**

**Delivered at Eldoret this 12th day of May, 2021**

**SIGNED BY: HON. JUSTICE J. N. ABUODHA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**