



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 446 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 13<sup>th</sup> January, 2020)**

**REV. PETER MATANO MUNENE.....CLAIMANT**

**VERSUS**

**KENYA EVANGELICAL LUTHERAN CHURCH.....RESPONDENT**

**JUDGEMENT**

1. The Claimant herein filed an Amended Memorandum of Claim on 4<sup>th</sup> December, 2017, in which he seeks compensation for unfair, unlawful and wrongful termination of his employment by the Respondent herein as well as failure by the Respondent to pay his terminal dues owed to him.
2. The Claimant states that he was employed by the Respondent on or about 3<sup>rd</sup> January, 1996, as a pastor and was posted to the Nairobi Lutheran Parish earning a monthly salary of Kshs. 15,440/-.
3. He further averred that he performed his duties diligently and to the Respondent's satisfaction as well as the church. The Claimant contended that sometimes in July, 2007 following prompts from the Respondent's Bishop Zachariah Kahuthu, he applied and successfully received a full scholarship to the United States of America to study for a Masters of Arts Degree in Congregational Mission and Leadership, which study was fully sponsored by the Global Mission Evangelical Lutheran Church in America.
4. The Claimant further contended that around 3<sup>rd</sup> July, 2012 while on short break from studies he received a letter signed by three members of the congregation at his last parish, Jerusalem in Nairobi, which letter was to the effect that he (the Claimant) and his family vacates their residential house which he was entitled to by virtue of his position as an Assistant Bishop.
5. The Claimant further averred that he received communication from the Deputy Secretary General of the Respondent casting aspersions on his loyalty to the Respondent and making various unsubstantiated allegations of his relationship with another church, which allegations the Claimant vehemently denied.
6. The Claimant contends that he was subjected to discrimination by the Respondent herein when it unlawfully stopped his monthly salary and House allowance. Further, that the Respondent failed to assign him duties following his return in June, 2013.
7. He further averred that the above actions by the Respondent amounted to constructive unlawful and

unfair dismissal from his employment.

8. Aggrieved by the Respondent's actions the Claimant filed the instant claim seeking the following reliefs:-

***a) Reinstatement and allocation of previous duties without any loss of benefits attached to his former office.***

***b) Salary from August , 2012 to date of filing suit***

***(Kshs. 15,440/- per month) Kshs. 262,480/-***

***c) House Allowance in lieu of church***

***accommodation (25,000/-) from***

***the time of eviction to date Kshs. 425,000/-***

***d) Untaken leave days Kshs. 46,320/-***

***TOTAL Kshs. 733,800/-***

***WITHOUT PREJUDICE AND IN THE ALTERNATIVE***

***a) Kshs. 934,520/-***

***b) General damages of Kshs. 7,500,000/-***

***c) Costs of the suit***

***d) Interest at Court rates since August, 2012 to date.***

9. The Respondent filed its Response to the Amended Claim filed in Court on 5<sup>th</sup> September, 2018, in which it admitted having engaged the Claimant herein. However, it denied the assertion by the Claimant that he was unfairly and unlawfully terminated contending that he (the Claimant) absconded duty.

10. The Respondent further avers that during the subsistence of the Claimant's employment, the Claimant was bound by a code of conduct, duty and ethics which he failed to observe as he breached the code of conduct severally and was unapologetic.

11. The Respondent further contended that the Claimant is currently under disciplinary procedures for misconduct being breach of confidentiality, insubordination and failure to obey lawful and proper commands from his employer, the Respondent herein contrary to the provisions of the Employment Act, 2007.

12. The Respondent states that it did not at any time discriminate against the Claimant as alleged in his Memorandum of Claim insisting that the terms of service for each of its staff was different and unique to the specific staff.

13. The Respondent contends that the Claimant is not entitled to the reliefs as sought in his Amended Memorandum of Claim as he has failed to demonstrate how he is entitled to the same.

14. The Respondent further raised a counterclaim and set off against the Claimant herein, wherein it is contended that the Claimant is indebted to it in the sum of Kshs. 130,064/- being the balance of a car loan advanced to him.

15. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim filed herein in its entirety and in turn allow the Counterclaim as prayed.

16. The matter was thereafter fixed for hearing on 8<sup>th</sup> October, 2019, when the Respondent failed to attend despite proper service.

### **Claimant's Case**

17. On 8<sup>th</sup> October 2019, the claimant (CW1) in his testimony reiterated the statement in his Memorandum of Claim and further relied on the documents attached thereto as his evidence in chief.

18. He further testified that he was employed by the Respondent on or about 3<sup>rd</sup> January, 1996 as a Pastor and was subsequently posted to Nairobi Lutheran Parish as an Assistant Bishop.

19. CW1 further testified that in July, 2007 he applied for and received a full scholarship to the United States of America to study at the Lutheran Seminary for a Master of Arts Degree in Congregational Mission and Leadership. He further averred that the study was fully sponsored by the Global Mission Evangelical Lutheran Church in America.

20. CW1 further testified that during the course of his education he did not cease being an employee of the Respondent herein. He confirmed having returned to the country in May, 2013 but the Respondent refused to reinstate him following rumours that he was planning to join another church. CW1 contended that the rumours were not true.

21. CW1 contended that following his return from further studies in the United States of America he was a victim of discrimination and intimidation from the Respondent herein and was subsequently evicted from the house he was provided for by the Respondent by virtue of his employment with the Respondent. CW1 further contended that his salary was equally withheld by the Respondent following his return.

22. He averred that the Respondent failed and/or refused and/or ignored requests from him to post him to any parish following his return from further studies in June 2013 despite requests from him.

23. CW1 contended that the Respondent's actions were in breach of his employment contract and the Employment Act and as a result he has suffered loss and damage. He further confirmed that he is yet to receive any salary from the Respondent since June 2013 to date. He further confirmed that he was not invited to any disciplinary hearing prior to his termination.

24. CW1 urged this Honourable Court to allow the instant Claim as prayed.

### **Claimant's Submissions**

25. It was submitted by the Claimant herein that the Respondent failed to follow the mandatory provisions of Section 41 of the Employment Act, 2007 as it failed to accord him any hearing prior to his constructive dismissal.

26. The Claimant further submitted that the Respondent's actions, which included its refusal to pay his salary, his eviction from the house allocated to him and the Respondent's refusal to assign him duties from June 2013, were only aimed at frustrating him to leave his employment with it.

27. The Claimant contended that the process that led to his termination was not fair and that the Respondent failed to justify the use of unfair procedure. To buttress this argument the Claimant cited and relied on the cases of **Daniel Wanjau Muhoho Vs Ol Pajeta Ranching Limited (2014) eKLR** and **Pamela Nelima Lutta Vs Mumias Sugar Company Limited (2017) eKLR**.

28. The Claimant further contended that his termination was without valid reason and was therefore contrary to the provisions of Section 45 of the Employment Act, 2007.

29. The Claimant for emphasis relied on the findings in the case of **Beatrice Achieng Osir Vs Board of Trustee Teleposta Pension Scheme, Cause No. 665 of 2011**, where the Court held that a termination is unfair where the employer failed to adduce valid reasons for termination.

30. The Claimant further submitted that he is entitled to the reliefs as sought in his Claim the Respondent having failed to adduce evidence to controvert his claims. He further contended that the Respondent further failed to discharge its obligation as required under the Provisions of Section 43(1) of the Employment Act, 2007 and his dismissal is therefore unfair.

31. On the issue of discrimination, the Claimant submitted that he is entitled to the relief as prayed as he was a victim of discrimination contrary to the provisions of Section 5 (3) of the Employment Act, 2007 that bars discrimination at the work place. He further contended in evidence that he was discriminated against in comparison to other members of staff.

32. He further urged this Court to find that the acts by the Respondent were discriminatory and amounted to subjecting him to hostile working environment a result of which he is entitled to the award of Kshs. 7,500,000/- as pleaded.

33. The Claimant further submitted that he is entitled to the relief of reinstatement the Respondent having failed to prove that it had valid reasons for terminating his services. He urged this Honourable Court to reinstate him to his previous post and rank without loss of any benefits and be paid benefits and salary increments that colleagues of his calibre and grades have benefited from since his suspension.

34. In conclusion, the Claimant urged this Honourable Court to allow his Claim as prayed.

35. This matter proceeded undefended the Respondent who had been served having failed to appear in Court during the hearing date of 8/10/2019.

36. From the evidence of the Claimant, he applied for a scholarship to go and undertake his Masters Course in the USA. This scholarship was approved as per his Appendix at page 5. The Respondent also wrote to the American Consular in Nairobi on 6.6.2011 to consider issuing him with a visa (page 6 and 7).

37. Vide a letter dated 8/11/2011 (page 17) - the Claimant was removed from serving as Assistant Chairperson in the office of National Kenya Evangelical Lutheran Church. There is no evidence of what happened thereafter but the Claimant still proceeded with his studies as earlier approved and graduated.

38. He also responded to matters sought vide the letter of 30/8/2013 in which he was expected to clarify certain issues before placement upon completion of his Masters studies (page 33 to 34).

39. There is evidence however that he was asked to vacate the house in Jerusalem Parish on 3/8/2012. He has indicated that he was never placed in any other church and neither was his salary paid from the time he resumed his studies. All these point to a constructive dismissal.

40. This evidence remained uncontroverted. I find that the Claimant's case remains undisturbed. I find that the Claimant has established his case as required by law. I find for him and enter judgement for him as follows:-

***1. Payment of salary from August 2012 to time of filing suit at 15,440/= per month = 262,480/=.***

***2. House allowance from time of eviction to time of filing suit = 15% x 15,440 x 17 months = 39,372/=.***

***3. 1 month salary in lieu of notice = 15,440/=.***

***4. 10 months' salary as compensation for unlawful termination = 10 x 15,440 = 154,400/=.***

**TOTAL = 456,252/=**

***5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.***

Dated and delivered in open Court this 13<sup>th</sup> day of January, 2020.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Chepkoech holding brief Kimuli Respondent – Present

Claimant – Absent