



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 33 OF 2014**

(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> April, 2020)

EDWARD MANGENI WANYONYI.....1<sup>ST</sup> CLAIMANT

LINET KAVEHA LUVISA.....2<sup>ND</sup> CLAIMANT

VERSUS

JASON BEAGLE.....1<sup>ST</sup> RESPONDENT

AMY BEAGLE.....2<sup>ND</sup> RESPONDENT

JENNIFER ASHLOCK T/A KENYA CHURCH

OF CHRIST CHILDREN HOME.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The Claimants instituted this suit vide the Statement of Claim filed on 20/1/2014, to challenge dismissal from their employment. In particular, they seek the following remedies:-

*a. Kshs. 2,544,664.00 in unpaid salaries, leave and overtime computed as follows:-*

**Edward Mangeni Wanyonyi**

EXPECTED SALARY	LEAVE	OVERTIME	PUBLIC HOLIDAYS	LESS PAID	AMOUNT	AMOUNT OWING
KShs. 40,000 a month x 30 months	Leave for 2 ½ years	Overtime 2 ½ years	Holidays for 2 ½ years			
KShs. 1,012,000	KShs. 70,666	KShs. 309,333	KShs. 69,333	KShs. 189,000		KShs. 1,272,332

**Linet Kageha Luvisia**

EXPECTED SALARY	LEAVE	OVERTIME	PUBLIC HOLIDAYS	LESS PAID	AMOUNT	AMOUNT OWING
KShs. 40,000 a month x 30 months	Leave for 2 ½ years	Overtime 2 ½ years	Holidays for 2 ½ years			
KShs. 1,012,000	KShs. 70,666	KShs. 309,333	KShs. 69,333	KShs. 189,000		KShs. 1,272,332

*b. Kshs. 80,000.00 being one-month payment in lieu of notice. Computed at Kshs. 40,000.00 each.*

*c. Damages for wrongful dismissal.*

*d. Compensation for loss of employment.*

*e. Cost of the suit.*

*f. Interest on (a) from 6<sup>th</sup> November 2013.*

*g. Any further or better relief this Honourable Court may deem fit.*

2. The Respondents filed a joint defence on 24/2/2014 where they denied being the Claimants' employers and urged that the suit be dismissed.

### **The Claimants' Case**

3. The Claimants aver that they are a married couple who were employed by the Respondents to care and parent the children at the Kenya Church of Christ Children's Home in Kitale from 1/6/2011 to 6/11/2011.

4. The Claimants aver that upon the commencement of their employment, they discovered that the Respondents had duped them and were grossly underpaying them a joint salary of Kshs. 10,000.00 instead of paying them separately. This subsisted for fourteen months until July 2012.

5. The Claimants aver that they were never issued with any letters of appointment or contracts of service. Instead, they were orally allocated duties.

6. It is averred that the nature of their duties required them to stay on the job overnight and work on the weekends and holidays, yet they were not paid overtime or salary in lieu of leave.

7. It is the Claimants' case that in August 2012, the Respondents adjusted their salaries to KShs. 7,000.00 each, which was still a gross underpayment. They aver that they constantly demanded payment of the adequate salaries but the same were never adjusted.

8. The Claimants aver that on 6/11/2013, they were summarily dismissed on the ground of gross misconduct. They were not paid salary in lieu of notice and were evicted from the premises and coerced into signing some documents, which were never availed to them. They further aver that the termination of their employment was wrongful and that they were entitled to 3 months' notice which would have enabled them to find alternative accommodation and jobs.

9. During trial, the 2<sup>nd</sup> Claimant testified as CW1. She adopted her witness statement dated 17/1/2014 and filed on 20/1/2014 as her evidence. It was her testimony that she was a social worker with a diploma in social works and welfare, who worked with vulnerable groups especially children. She stated that she had her own duties, separate from those of her husband. It was her testimony that the organization gave them accommodation.

10. She testified that she was paid Kshs. 38,000.00 upon her dismissal and that she had not gotten alternative employment since then. She denied that the Respondents paid her children's fees and contended that her children had been educated through the sponsorship of other donors.

11. During cross-examination, it was her testimony that her employer was Kenya Church of Christian Children's Home and that the trustees of the organization were Thomas Omemo, Kennedy Obura and Samen Luchinya. She stated that the Respondents were also employees. She testified that she had applied for the position of a caregiver.

12. It was her evidence that they were issued with a contract on 1/8/2012, one year after being in employment. It was her testimony that she was paid Kshs. 8,000.00 as salary and issued with an additional Kshs. 2,000.00 to pay as her children's fees. Her husband was also given the extra Kshs. 2,000.00. She stated that the salary was later increased to Kshs. 9,000.00.

13. She testified that though her contract provided for leave, she never went on the same except for the day she visited her sick mother. It was her testimony that Sunday was her day for worship and not her day off. She maintained that she worked on her off days. She admitted that her NSSF and NHIF deductions were made from her salary.

14. She contended that in the first contract they were not paid for working on holidays but conceded that the provisions for working during holidays were made in the second contract. She further conceded that she never complained for not being paid overtime. It was her admission that she was paid salary in lieu of notice upon the termination of her employment.

15. Upon re-examination, it was her testimony that she did not know the trustees of the organization and admitted that she had sued the administrators.

16. The 1<sup>st</sup> Claimant testified as CW1. He adopted his witness statement dated 17/1/2014, as his evidence. He stated that he was a psychologist and a social worker. It was his testimony that he was a volunteer teacher at Hekima Academy in Eldoret.

17. He admitted that during the subsistence of his employment, he would often take a few days leave. He testified that they were supposed to have been paid Kshs. 10,000.00 each, instead, they were paid Kshs. 5,000.00 each. It was his testimony that he expected a monthly salary of Kshs. 40,000.00 because of his qualifications. He stated that he was paid some money for a few days leave.

18. According to him, he was terminated for writing a letter, which he had written on behalf of the 1<sup>st</sup> Respondent. He testified that he had written several letters before, on the 1<sup>st</sup> Respondent's behalf. He admitted that he was forced to apologize for writing the letter.

19. During cross-examination, it was his testimony that the Respondents were directors of the project. He conceded that he knew the trustees and admitted that he had not sued them. He also conceded that he had no authority to write the recommendation letter. He admitted to being paid for working on holidays and further admitted that his contract made provisions for leave taken. He testified that he was paid a stipend.

20. It was his testimony that he entered into a contract in 2012 and 2013 and that his salary was Kshs. 9,000.00. He stated that his employment was terminated by Kenya Church of Christ Children's Home.

21. Upon re-examination, it was his testimony that he had never met the trustees and had known of their existence in Court.

### **The Respondent's Case**

22. The Respondents deny trading as Kenya Church of Christ Children's Home and contend that the Claimants' employer was a body corporate capable of suing and being sued.

23. The Respondents further aver that the Claimants' salary was negotiated and it was agreed that they would be paid Kshs. 10,000.00 and was to be reviewed later. In August 2011, their salary was reviewed to Kshs. 11,000.00. It was also reviewed to Kshs. 8,000.00 and Kshs. 9,000.00 in August 2012 and April 2013 respectively, at the employer's instance.

24. The Respondents aver that the Claimants were also entitled to accommodation, meals and education provision for their children. It is contended that the Claimants were given a day off in a week and that they agreed to work on the holidays that fell on the weekdays in exchange for holiday pay. The Respondents further contend that the Claimants were paid for all the holidays worked and leave days not taken.

25. The Respondents aver that on 2/11/2013 and without authority, the 1<sup>st</sup> Claimant wrote a recommendation letter for Patrick Kisia on his employer's letterhead, indicating that he had worked for the institution as a caretaker from 2008 to 2011. This information, they aver, was false as the individual had never worked for the institution as alleged.

26. It is averred that the 1<sup>st</sup> Claimant admitted to authoring and signing the letter and even issued an apology regarding the same. Consequently, the 1<sup>st</sup> Claimant was summarily dismissed.

27. The Respondents contend that the reason the Claimant was ejected from the premises was because he was rowdy and abusive. However, the 2<sup>nd</sup> Claimant stayed until 9/11/2013.

28. The Respondents contend that the Claimants are not entitled to the reliefs sought. They also object to their joinder as parties contending, that the suit herein is incompetent.

29. On 6/3/2013, the Claimants filed a rejoinder to the Respondent's response contending that the recommendation letter was written pursuant to the 1<sup>st</sup> Respondent's instructions.

30. The 1<sup>st</sup> Claimant contends that nothing was offensive about the letter. He denies making admissions to the police or being rowdy and abusive and contends that he only protested the racial remarks made against him by the 1<sup>st</sup> Respondent.

31. It is averred that Patrick Kisia was a pastor at the Church of Christ in Cherangani.

32. During trial, the 1<sup>st</sup> Respondent testified as RW1. He adopted his witness statement dated 20/2/2014 and filed on 13/5/2019 and the bundle of documents, as his evidence. It was his testimony that he had been an administrator of the Children's Home but no longer worked there.

33. He testified that the Claimants were employed on 1/6/2011 earning a starting salary of Kshs. 10,000.00 as a couple, exclusive of benefits. Their salaries were increased to Kshs. 8,000.00 and later to Kshs. 9,000.00 for each individual.

34. He stated that the Claimants took one day off each week, they took their annual leave or were paid in lieu of leave. According to him, the 1<sup>st</sup> Claimant was paid Kshs. 1,140.00 on 20/12/2012 for the leave days not taken.

35. It was his testimony that the Claimants were paid only when they worked on holidays. He gave the example of the payment made to the 2<sup>nd</sup> Claimant on 27/4/2012 for the sum of Kshs. 4,550.00. It was also his testimony that according to the attendance records, every Sunday was their day off.

36. He stated that on 22/11/2013, he received a call from another Children's Home making enquiries on Patrick, who had allegedly worked for them, yet he did not know him as he had not worked for the organization. He met Patrick on 26/11/2013 and who had been recommended by the 1<sup>st</sup> Claimant. He denied giving instructions to the 1<sup>st</sup> Claimant to write the letter, a fact which was admitted by the 1<sup>st</sup> Claimant when enquiries were made about the same.

37. It was his testimony that he consulted the Board of Trustees, who directed that the 1<sup>st</sup> Claimant be summarily dismissed. The 2<sup>nd</sup> Claimant's services were also terminated as they had been hired as a couple.

38. During cross-examination, it was his testimony that the Claimants were issued with contracts in April 2012 and not appointment letters. He testified that the Claimants' employment was terminated on 6/11/2013 but they were given their termination letters on 8/11/2013. He stated that they hired a widow after the termination of the Claimants' employment but contended that terminating the 2<sup>nd</sup> Claimant's employment had not been driven by malice. He conceded that the contracts entered into in 2011, were not before Court.

39. It was his testimony that the money used to sponsor the Claimants' children was deducted from their salaries.

40. During re-examination, it was his testimony that the widow had been employed on a temporary basis. He maintained that the Claimants had been paid what they were entitled to.

### **The Claimants' Submissions**

41. In their submissions filed on 20/1/2020, the Claimants submit that no plausible reason was given as to why the 2<sup>nd</sup> Claimant's employment was terminated. It is submitted that the only reason her employment was terminated was because she was the 1<sup>st</sup> Claimant's wife, yet they had separate contracts. As such, her dismissal was wrongful and unconstitutional as she had been discriminated against because of her marital status and was dismissed without being heard.

42. The Claimants submit that the 1<sup>st</sup> Claimant's employment was terminated out of malice since the Respondents did not prove his gross misconduct as required under Section 44 of the Employment Act. The Respondents did not adduce evidence to prove that he was charged with forgery neither was the letter that had been allegedly forged, presented before this Court. As such, he was wrongfully dismissed and seeks compensation by way of damages. They rely on the case of **James O Oloo vs. Tana and Athi River Development Authority [2016] eKLR** where the Court held that the termination of the Claimant's employment was unfair since due process was not followed.

43. The Claimants submit that their salaries were inadequate, in view of the professional qualification and skilled duties that they were required to perform and amounts exploitation and infringement of their right to fair remuneration. It is their position that the minimum wage of Kshs. 40,000.00 sought is not unreasonable, since the [www.mywage.org/Kenya](http://www.mywage.org/Kenya) sets the minimum wage for the lowest cadre of childcare workers in Kenya as Kshs. 76,480.00.

44. The Claimants submit that the Respondents were their employers having employed them on behalf of the Kenya Church of Christ Children's Home. Further, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents executed the Claimants' contracts of employment. They contend that there is no evidence that the Kenya Church of Christ Children's Fund Trust Registered Trustees was an institution under the Children's Act, to run the Kenya Church of Christ Children's Home. Further, its certificate of incorporation, suggests that its object is holding properties and donations on behalf of the Children's Home.

### **The Respondents' Submissions**

45. In their submissions filed on 21/1/2020, the Respondents submit that the 1<sup>st</sup> Claimant was not authorized to write the impugned letter as proved during the hearing, as such, he is not entitled to damages for wrongful termination.

46. The Respondents submit that the 2<sup>nd</sup> Claimant's employment was terminated because the Claimants were employed as a couple and because she could not delegate her duties. They further submit that the 2<sup>nd</sup> Claimant is not entitled to payment in lieu of notice as the same was paid to her.

47. The Respondents submit that the Claimants are not entitled to the claim for underpayment as they were employed because they fitted the description of house parents and not on the basis of their professional qualifications. It is therefore submitted that the Claimants have not proved their case for unfair termination hence not entitled to the reliefs sought as the same are unjustifiable and outrageous.

48. The Respondents submit that they have been wrongfully joined to this suit. They are of the position that they were administrators and not the Claimants' employers. They rely on the case of **Trustees of the Agricultural Society of Kenya vs. James Gitonga [2017] eKLR** where the Court of Appeal upheld the lower court's judgment that dismissed the claim for unlawful termination due to the Claimant's failure to sue his employer.

49. The Respondents urge this Court to be persuaded by this decision, though distinguishable, as they have adduced the relevant certificate of registration proving that the organization was registered under the Trustees (Perpetual Succession) Act, hence section 3 (3) of the Act applies.

50. I have examined the evidence and submissions of the Parties herein. The Claimants admitted that the Respondents herein were employees of Kenya Church of Christ Children Home like themselves. They also admitted that they knew the trustees of the said home but had not sued them.

51. The Respondents produced evidence to show that Kenya Church of Christ Children Home was a registered trustee with perpetual succession and the trustees were Thomas Omemo, Kennedy Obura and James Luchivya.

52. Under Cap 167 Trustees (Perpetual Succession) Act, trustees are personally liable for contracts entered into by their employees.

However, they are entitled to an indemnity out of the trust fund for liabilities properly incurred.

53. In **Tenesheles Trust and Others vs BDO Mann Judd (Supreme Court of the Bahamas)** (16<sup>th</sup> November 2009) J. Adderly commented as follows:-

*“it is trite law that a trust lacks legal capacity ..... A trust is an arrangement, not an entity”.*

54. In such an arrangement then the appointed trustee is the person or entity with capacity to undertake these legal formalities.

55. In the current case, the Claimants chose to sue fellow employees and not trustees of the trust. As such, the Respondents are improperly enjoined in this case. This was also the holding of the Court of Appeal in **Trustees of the Agricultural Society of Kenya vs James Gitonga (2017) eKLR.**

56. I therefore find that there is no case against the Respondents herein who lack capacity to be sued. I proceed to strike out this case accordingly with no orders as to costs.

Dated and delivered in Chambers via Zoom on this **15<sup>th</sup> day of April, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties