



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 445 OF 2014

LUCY WAMBUI WAWERU

CLAIMANT

v

METHODIST CHURCH IN KENYA REGISTERED TRUSTEES

1st RESPONDENT

SUPERINTENDENT, LAVINGTON UNITED CHURCH

2nd RESPONDENT

JUDGMENT

1. The Lavington United Church was established as a united interdenominational church through a trust deed of 20 December 1959 between the Anglican Church of Kenya, the Methodist Church of Kenya and the Presbyterian Church of Kenya (PCEA).
2. On or around 23 December 2008, Lucy Wambui Waweru (Claimant) a member of the PCEA applied to the Lavington United Church to be considered for the position of Youth Pastor.
3. Lavington United Church considered the application and on or around 30 January 2009, the Superintendent Minister of Lavington United Church (Superintendent) wrote to the Claimant offering her the position of an Associate Youth Pastor. The appointment was to last until 1 July 2009.
4. When the Claimant's contract expired 1 July 2009, she was issued with another contract dated 21 July 2009. She was to continue serving as Associate Youth Pastor. The new contract was to lapse on 30 June 2011.
5. In the course of the Claimant's initial contract and more particularly on 7 July 2009, the Superintendent recommended to the PCEA to consider the ordination of the Claimant.
6. Acting upon the recommendation for the ordination of the Claimant, the PCEA deployed/posted the Claimant as a student Minister to Lavington United Church through a letter dated 29 July 2010. The Claimant was eventually licensed as church minister under the PCEA on 13 March 2011 and thereafter ordained on 3 April 2011.
7. Upon ordination, the PCEA, through a letter dated 16 May 2011 posted the Claimant to Milimani Presbytery with a recommendation to serve or be deployed at Lavington United Church. The PCEA proposed terms of engagement for the Claimant.
8. Despite the ordination, posting and proposed terms of service, Lavington United Church did not improve on the Claimant's terms and the PCEA in a letter dated 16 December 2011 to Superintendent alleged that the Claimant was still being treated as a Youth coordinator.
9. The letter requested that the Claimant be treated as an ordained Minister.
10. It appears that the Claimant's terms of service were not improved and the relations between the Claimant and Lavington United Church leadership was boiling.
11. On 10 January 2012, the Superintendent issued a *show-cause notice* to the Claimant to explain why disciplinary action should not be taken against her on the ground of insubordination (organising an Harambee to raise fees for a named person). The Claimant was not taken through a disciplinary process in regard to the allegations.
12. On 28 March 2013, the PCEA wrote a letter to the Presiding Bishop, Methodist Church of Kenya decrying the continued ill-treatment of the Claimant.

13. The letter to the Presiding Bishop was followed in short order with a letter dated 10 April 2013 from the Superintendent inviting the Claimant to attend a Church Executive Committee meeting later on the afternoon of 10 April 2013. The agenda of the meeting was the conduct of the Claimant. The Claimant attended the meeting.

14. On 11 April 2013, the Superintendent wrote to the Claimant to notify her of the termination of her service and the reason(s) were given as remarks made by yourself during the church leaders meeting on 6th April 2013 which were insubordinate, the use of derogatory language, circulation of rude of texts to the Chairman and threats to the Leaders Meeting to supposedly expose the church on social media together with other disrespectful conduct.

15. The notice advised the Claimant that she would be paid salary up to 11 April 2013, 1-month salary in lieu of notice, accrued leave for 2013 and pension benefits.

16. When informed of the turn of events, the PCEA wrote to the Presiding Bishop of the Methodist Church in Kenya on 16 April 2013 lamenting that the decision to dismiss the Claimant was contrary to the trust deed of 1959 between the PCEA, the Anglican Church of Kenya and the Methodist Church of Kenya.

17. The Claimant thereafter sought legal advice and on 20 June 2013, her legal advisers sent a formal demand to the Superintendent alleging unfair termination of employment.

18. On 20 March 2014, the Claimant instituted these legal proceedings alleging *unfair and malicious termination of employment and breach of contract*.

19. The Respondents filed a joint *Memorandum in Response* to the Claimant's *Memorandum of Claim* on 30 April 2014, contending that the termination of the Claimant's service was lawful and in compliance with the trust deed.

20. On 19 March 2019, the Cause came up for pre-trial directions and the Claimant indicated she had complied.

21. The Court directed the parties to comply with the Rules of Court within 14 days and thereafter fix a hearing date in the Registry.

22. The hearing commenced on 28 October 2019 and continued on 9 March 2020.

23. The Claimant, the PCEA representative to Lavington United Church, and a former Chair/Senior Steward of Lavington United Church testified.

24. The Claimant's submissions were not on record by the agreed timeline of 9 April 2020. The Respondents' submissions were also not on record by 8 May 2020 as directed.

25. The Court has considered the pleadings, evidence and identified the Issues for determination as examined hereunder.

Unfair termination of employment

26. It is not in dispute that Lavington United Church operated under a trust deed and that the Church is under the sponsorship of the Methodist Church of Kenya, the Anglican Church of Kenya and the PCEA.

27. Under the trust deed, the pastoral charge of Lavington United Church is entrusted to the Methodist Church of Kenya while under clause 8 of the Trust Deed, the Leaders Meeting is convened and serves as the Court of Discipline.

28. The Leaders Meeting is properly convened and composed of one representative appointed by the PCEA and the Anglican Church, apart from the Methodist Church in Kenya.

29. The Claimant as a Minister was answerable to the Leaders Meeting of Lavington United Church.

30. In line with the clause 8 of the trust deed, the PCEA notified the Superintendent through a letter dated 13 December 2011 of the appointment of Mr. C P Mwangi as its representative to the Leaders Meeting, Lavington United Church.

31. The question, therefore, is whether the Claimant was offered an opportunity to be heard by a Leaders Meeting duly convened as a Court of Discipline.

32. Claimant admitted that she attended a Leaders Meeting on 6 April 2013. She was thereafter invited to a Church Executive Committee meeting on the evening of 10 April 2013 where she was the subject of the agenda.

33. The Claimant testified that upon receipt of the invitation she consulted with the PCEA representative to the Lavington United Church, Mr. Mwangi and he advised her to attend the meeting.

34. According to the Claimant, present in the meeting were Prof. Magelo (acting Superintendent), Mr. Gichuki (Steward), Dr. Mumbi, Ms. Kaimenyi and the Human Resource Steward. The representative of the PCEA was not present. The Claimant did not disclose if the representative of the Anglican Church was present.

35. The Respondents' witness on his part admitted that the Claimant was not issued with a *show-cause(s)* before the meeting held on 6 April 2013 and 10 April 2013 and that although records/minutes were available, the same had not been filed in Court.

36. On those who attended the meeting of 10 April 2013, the witness confirmed that those present were the acting Superintendent, Human Resource Steward, Vice-Chair of the Leaders Meeting, Finance Steward and himself. He confirmed that the representative of the PCEA was not invited and was not at the meeting.

37. Explaining why the PCEA representative was not invited, the witness stated that the issue was an employment dispute, and it is the Lavington United Church which was the Claimant's employer and not the PCEA.

38. The Court has already referred to clause 8 of the Trust Deed. It provides for a Court of Discipline. The Court is the Leaders Meeting convened as such. The Leaders Meeting and the Court of Discipline require the representatives of the PCEA and the Anglican Church to be properly and validly convened.

39. Since there was no evidence that the representatives of the PCEA and the Anglican Church were invited (or were present), the Leaders Meeting held on 10 April 2013, was in the view of the Court, not validly constituted as a Court of Discipline. The decision to terminate the Claimant's service was therefore made by an alien entity with no such power(s) in terms of the Trust Deed.

40. Apart from the trust deed, the general law of employment in this country guarantees employees certain minimum protections when termination of service is contemplated (the Respondents did not dispute that the Claimant despite being an ordained minister of the Lord, was an employee for purposes of secular law).

41. Sections 35(1)(c) and 41 of the Employment Act, 2007 envisages *written notice of termination of employment* and affording the employee an opportunity to be heard.

42. Some of the elements of the right to be heard include informing the employee of the allegations to confront, affording him/her sufficient facilities to make a defence and allowing the employee to be accompanied during the hearing, if practical or possible.

43. If indeed, and the Court does not doubt it, the Claimant misconducted herself on 6 April 2013, the Respondents' should have issued her with a *show-cause* setting out the allegations to confront, and calling upon her to defend herself.

44. The invitation letter sent to the Claimant did not set out any allegations. It barely gave the Claimant sufficient time to prepare a defence or arrange for a colleague to be present. To make matters worse, the representative of her sponsoring Church was not invited.

45. The termination of the Claimant's service, the Court finds, did not meet the Respondents internal standards, nor the minimum statutory threshold despite the offer of salary in lieu of notice. The decision was unfair.

Compensation

46. The Claimant served the Respondents for about 3 years and in consideration of the length of service, the Court is of the view that the equivalent of 5-months gross salary would be fair and appropriate (gross salary was Kshs 70,800/).

Breach of contract

Airtime loss

47. The Claimant made a claim for Kshs 36,000/- said to be airtime for 1-year. The contract provided for monthly airtime of Kshs 3,000/-.

48. Airtime allowance is facilitative, and in the view of the Court cannot be claimed after separation, however unfair, unless expressly agreed to in a contract. Relief is declined.

Underpayments

49. Underpayment of remuneration may arise at least under two scenarios. Payment of salary below the minimum prescribed wages or below the contractually agreed rates. In such scenarios, it would be a straight forward case.

50. In order to succeed on a claim for *discriminatory pay*, a Claimant should establish through evidence that the pay received is less than that of a chosen *comparator(s)* who does equal work or work of equal value, and further that there are conditions giving rise to a presumption that there is unequal pay.

51. In the case at hand, the Claimant anchored this head of the claim on *discriminatory pay* in that her colleagues in the same job group and category were paid more. She also relied on proposals made by the PCEA to Lavington United Church.

52. Unfortunately, the Claimant did not name the *comparators*, nor produce any records on their pay, job descriptions, experience, skills or any other documentation.

53. The proposed remuneration from the PCEA Moderator were mere proposals and not sufficient to prove discrimination on pay.

54. This head of the claim was not proved.

Conclusion and Orders

55. The Court finds and declares that the termination of the Claimant's service was unfair and awards her

(i) Compensation **Kshs 354,000/-**

56. The Claimant did not file submissions even within the extended time. She is denied costs.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 29th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kamaara instructed by P.M. Kamaara & Associates

For Respondents Ms. Chege instructed by Kamau Kuria & Co. Advocates

Court Assistants Lindsey/Judy Maina