



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.40 OF 2019**

**REV. JOHN NJURU NDUNG'U.....CLAIMANT**

**VERSUS**

**AIC KIJABE STATION MANAGEMENT.....RESPONDENT**

**JUDGEMENT**

The claim is that the claimant was employed as Station Manager for three years renewable contract executed on 29<sup>th</sup> June, 2019. The respondent being the administrative body of the Mission Station Property on behalf of Africa inland Church Kenya (AIC) was the supervisor.

The claim is that the respondent dismissed the claimant by summary dismissal on 13<sup>th</sup> March, 2019.

The claim is also that on 29<sup>th</sup> June, 2015 the claimant commenced work with the respondent on contract basis. The contract was renewed on 29<sup>th</sup> June, 2018.

On 13<sup>th</sup> February, 2019 the claimant was sent on administrative leave of 30 days to allow for financial audit and to allow for handing over of the management report.

On 13<sup>th</sup> March, 2019 the claimant was issued with letter of summary dismissal without any valid reason, without notice or being given time to defend himself.

After the termination of employment the respondent made unjustified claims that the claimant owed Ksh.17,000 which was not in issue before.

The claim is that there was unfair termination of employment, the law was not followed and the claimant is seeking the following dues;

- a) Notice pay of 4 months at ksh.116,982 x 4 at ksh.467,928;
- b) Unexpired term contract at age 70 and he was 53 years being 17 years pay Ksh.23,864,328.70;
- c) Retirement benefits per the church laws and gratuity at 17 years Ksh.24,829,430.20
- d) Certificate of service; and
- e) Costs.

The claimant testified that he was employed by the respondent under fixed contracts of service. the first contract was signed on 29<sup>th</sup> July, 2015. The second contract was signed on 29<sup>th</sup> July, 2018. He was earning Ksh.60,000 per month and based at AIC Kijabe station as the Station Manager.

The respondent accused him of fraudulent activities and that he sold firewood and there was no payment but at the time of summary dismissal, the same had not been paid for. he followed up and confirmed the payment was done. On 19<sup>th</sup> December, 2018 he was accused of procuring a medical bill of ksh.15,000 but he had paid own cash and asked the balance be paid though his salary for his house caretaker who was sick and then died. There were accusation that he purchased an item of rubber at a high cost yet there was a resolution for him to buy it from London, he got a cheque of ksh.100,000 and used Ksh.74,000 and returned the balance of Ksh.24,000 and got receipt. The claimant was also accused on sourcing for software in the year 2016 for lap top but when he went to the USA it got lost and since it is intangible the respondent demanded that he should pay back.

The claimant also testified that upon his summary dismissal he has paid to the respondent ksh.40,000 upon demand to clear with the respondent.

The claimant also testified that he is aware the respondent has own internal disputes resolution mechanisms, he tried to apply it but the respondent did not oblige. His contract was renewed by the respondent and his last salary was ksh.126,000 increased in December by the board. He has no evidence of the salary increase as he was not allowed to collect his documents at his office after summary dismissal.

He has pending payments with the respondent after he requested for a salary deduction to pay for his house caretaker who was admitted at the AIC hospital and died. At the time employment terminated he had not paid ksh.2,700.

## **Defence**

The defence is that the court lacks jurisdiction to determine the matter by virtue of the constitution of the AIC church Kenya and the claim as drawn is incompetent and should be dismissed with costs.

The defence is also that the claimant was employed as station manager on contract for a period of 3 years of 27<sup>th</sup> July, 2015 and not 29<sup>th</sup> June 2015 as alleged by letter dated 25<sup>th</sup> April, 2016 employment was confirmed at a salary of Ksh.70,000 per month

On 23<sup>rd</sup> June, 2017 the salary was reviewed to ksh.77,000 per month and on 29<sup>th</sup> June, 2018 employment contract was renewed for 3 years with a salary increase of 10% at ksh.84,700 per month.

The defence is that the claimant illegally and without justifiable cause increased his salary to ksh.116,347 and ksh.126,982 and also proceeded to renew his contract on 29<sup>th</sup> June, 2018 a month before his contract was to expire on 27<sup>th</sup> July, 2018 and by this act his contract was ambiguous. The respondent is entitled to claim what the claimant was paid illegally during his tenure, monies received to procure goods and services never rendered or received, and following fraudulent activities he disposed the respondent of its property.

The particulars of the fraudulent activities are that on 31<sup>st</sup> May, 2017 the claimant sold firewood worth Ksh.40,000 to Kinyanjui Boys High School where he was an administrator and which amount was not paid to the respondent. on 19<sup>th</sup> December, 2018 the claimant illegally and contrary to the AIC procured a medical bill credit to his employee James Ngondi for Ksh.15,116 which amount he had not cleared. On 10<sup>th</sup> October, 2016 the claimant falsely represented that a rubber for the respondent's water pump would cost Ksh.100,000 whilst actual cost was Ksh.76,000 and a cheque was done in his name but never procured the rubber and thus the respondent demanded for a refund of the total amount of Ksh.100,000 which has never been paid.

In the year 2016 the claimant imported from Britain software known as Quick Books Accounting worth Ksh.33,989 which he was using but in the year 2017 he illegally appropriated the software for his own. He has also appropriated the laptop and office phone and the respondent has been unable to recover the same.

13<sup>th</sup> March, 2017 the respondent demanded ksh.173,467 in lieu of the appropriated items and for which the claimant paid after his summary dismissal. This is proof of the fraudulent activities by the claimant. Summary dismissal was justified in the circumstances of the fraudulent activities. There was no breach of the law or unfairness as alleged.

For the good of the institution and the employees it was justified to terminate employment as otherwise the respondent would have suffered irreparable damage and loss.

The claims made for payment of notice, retirement benefits and unexpired term contract are without justification and should be dismissed with costs. The claimant should repay the sum of ksh.384,375 illegally inflated for his salary.

Samuel Kabute the station manager with the respondent testified that the claimant was an employee of the respondent and has not exhausted the internal disputes resolution mechanisms within the respondent church before filing suit with the court. an aggrieved party has the right to file a complaint with the Church Disputes Tribunal (CDT) and the five member committee can arbitrate. This matter ought to be referred back to the CDT.

Mr Kabute also testified that the claimant was under a term contract of employment and his last salary was Ksh.84,700 per month. There was no increase to the sum of ksh.126,000 and any record to this effect has not been produced. This led to the increase of the wage bill and the salary increase was illegal. The claimant was charged with fraud and he has since repaid these monies.

The respondent is an administrative body under the AIC with mandate to care for the mission station on behalf of the church property in Kenya. The Kijabe station is taken care of by the respondent. the respondent is not an independent entity but acts for and on behalf of the church. There is no state registration but under the charge. Any grievances that the claimant may have had should have gone through the church.

At the close of the hearing, both parties filed written submissions.

The claimant submitted that the filed suit after the respondent failed to honour his demands and after they replied with a counterclaim.

Termination of employment was without justification under the provisions of section 43 and 45 of the Employment Act, 2007 (the Act). the termination of employment was on the basis that the respondent was unable to sustain the high wage bill but the claimant was never invited

for a hearing or to discuss his work performances. There was no procedural fairness pursuant to section 40, 41, 43 and 44 of the Act.

The claimant relied on the cases of **Kenfreight (E.A) Limited versus Benson K. Nguti [2016] eKLR; Sammy Walter Birya versus Shree Swaminarayan Academy [2016] eKLR; O.K.M.N versus Presbyterian Foundation & another [2014] eKLR.**

The respondent submitted that the claim is incurably defective as the case against the respondent is against a non-entity and ought to have been against AIC Kenya under which the respondent fell as an administrative body. The claimant ought to have sued the Board of Trustees of AIC as held in **Andrew Inyolo Abwanza versus Board of Trustees of Pentecostal Assemblies of God – Kenya & others, HCCC No.69 of 2009.** The respondent is not an entity capable of being sued.

The respondent also submitted that the claimant ought to have invoked the internal disciplinary mechanisms of the AIC before moving the court which he squandered as held in the case of **Pamela Nelima Lutta versus Mumias Sugar Company Limited Cause No.335 of 2011.** The claim should therefore be dismissed with costs.

The issues which emerge for determination herein can be summarised as follows;

Whether the court has jurisdiction;

Whether the respondent is an employer and or property party herein;

Whether there is unfair termination of employment;

Whether the remedies sought are due; and

Who should pay costs.

The jurisdiction of the court is derived from articles 162 of the Constitution, 2010 read together with section 12 of the Employment and Labour Relations Court Act, 2011 together with all other enabling statutes. Where there exists an employer and employee relationship, a matter with regard to labour relations and for connected purposes, the court has jurisdiction.

In the case of **Hassan Willy Lesupen & others versus The National Constituencies Development Fund Board & others Petition No.2 of 2020 (Nakuru)** the court held that;

*The court enjoys original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between parties with regard to employment and labour relations and for connected purposes as vested under articles 159(1), 162 (2) (a) as read with article 165(5) and (6) of the Constitution, 2010; articles 22(1) and 258(1) of the Constitution, 2010, and the provisions of the Employment and Labour Relations Court Act, 2011.*

In this case, the claim is premised on the facts that there was an employment relation relationship between the parties. Whereas the respondent has the CDT to address disputes internally, such mechanism ought to have been addressed before filing suit and or immediately upon the filing suit the respondent was at liberty to invoke the provisions of section 15 of the Employment and Labour Relations Court Act, 2011 as otherwise, the claim is properly before this court as both parties agree there was an employment relationship and the claimant was serving the respondent under a written contract of service.

The claimant cannot be denied this forum to urge his case on the basis that there exists an internal mechanism under CDT. That is since overtaken by events. The court jurisdiction cannot be replaced by such mechanism and the claimant retained and still retains the right to urge his employment and labour relations claims with the court. with regard to nature of employment and the entity of the respondent, both parties have attached the contract of employment under the initial engagement (first contract) the and renewed term (second contract). Both relates to the claimant and *AIC Kijabe Station Management*. Under such entity the claimant was employed as station manager of *.I.C Kijabe Station*.

Both contracts of employment dated 27<sup>th</sup> July, 2015 and 28<sup>th</sup> July, 2018 are executed by the claimant and John Mukera, *Chairman, KSM Committee*.

There are several communication between the claimant and the respondent under the same name and style, AIC KSM {Kijabe Station Management}. The letter terminating employment dated 13<sup>th</sup> March, 2019 is under the respondent, *AIC Kijabe Station Management* and signed by Pst Jefferson A.K. Gathu, Chairman, and KSM Committee.

Section 2 of the Employment Act, 2007 (the Act) defines an employer as follows;

*“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;*

taking the above into account, the evidence before the court, the records of employment, there is an employment history between the parties and the respondent in its capacity as agent and or manager and administrative body contracted the claimant as the station manager to run its affairs as an employee in its capacity as employer.

The respondent has since received and accepted payments from the claimant in the nature of *AIC Kijabe Station Management* and not under any other name to suggest there were operations under any other parallel body or entity other than the respondent in its own right as an employer. See **Nderitu Kaguu Githae & others versus Lloita Hill Spring Limited, Cause No.170 of 2018 (Nakuru)**.

As the matter is now placed before the hands of men and women of justice there is no shame for the men and women of clothe to visit the tower of justice as only justice shall ensue. This is not contrary to the doctrine laid out in Deuteronomy 1:16-17;

*And I charged your judges at that time, 'Hear the cases between your brothers, and judge righteously between a man and his brother or the alien who is with him. You shall not be partial in judgment. You shall hear the small and the great alike. You shall not be intimidated by anyone, for the judgment is God's. And the case that is too hard for you, you shall bring to me, and I will hear it*

This in my humble view is not a contradiction to what Apostle Paul in his letter to the Corinthians at 1 Corinthians 6:1 said. Settle disputes among yourselves as believers and if unable to, the seat of justice stands. This is one such case.

With regard to claims that the claimant was unfairly terminated from his employment by the respondent, both parties agree that the claimant was at all material times under a written term contract as noted above. The last contract is dated 28<sup>th</sup> July, 2018 for a period of three (3) years. the contract has its terms and conditions of service and including a termination clause that either party was at liberty to issue notice of 4 months or payment in lieu of notice. the monthly salary was agreed at *your current gross salary will be increased by 10%*.

There is the respondent's letter dated 23<sup>rd</sup> June, 2017 increasing the due salary by 10% total due being ksh.77,000 per month. The court reading of the contract of employment issued on 28<sup>th</sup> July, 2018 a year after the last salary review and increment is that this was legitimate and correct and a reasonable review from ksh.77,000 to Ksh.84,700 per month.

A written contract of employment being the primary record of employment, and without any contrary evidence of any other form of agreement between the parties, the claimant and the respondent were covered in the employment relationship under the contract dated 28<sup>th</sup> July, 2018.

By letter dated 13<sup>th</sup> February, 2019 the respondent sent the claimant for *one month paid leave* on the grounds that;

*You are being placed on paid administrative leave effective from today. ... this is paving way for a financial audit and dissects of the hand over report or the former KSM Committee, of which you were manager and advisor to the committee is conducted independently.*

*It is anticipated that the exercise will be concluded within 30 days where you will be entitled for your whole monthly pay. ... while you are on administrative leave, you are not supposed to come to worksite/and other specified areas or transact any business on behalf of Kijabe Station Management until your scheduled return to work of 30 days is over. ...*

*[signed]*

*Jefferson Gathu*

*Chairman – KSM*

I take the one month leave was to end on 12<sup>th</sup> March, 2019.

On 13<sup>th</sup> March, 2019 the claimant was issued with letter terminating his employment by summary dismissal. The summary action was on the grounds that the employment contract provided for termination of employment by notice or payment of notice in lieu thereof and hence the respondent would pay the claimant for 4 months at ksh.90,000 x 4 all being Ksh.360,000.

Whereas the employer has the right and or prerogative to send an employee on an administrative leave and or compulsory leave, the administrative action on the employee should be for the stated purpose.

It should therefore be seen as an administrative action imposed on an employee with stated reasons.

In this case, the claimant was sent on *one month pad leave to pave way for a financial audit and dissect of the hand over report of the former KSM committee*. the purpose was to remove the claimant from the workplace to allow for audit investigations.

The dictates of section 41 and 43 of the Act requires that Upon investigations, the employee may be issued with a show cause notice or where found not culpable be returned to work. See the case of **Elizabeth Cherono Kurgat versus Kenya Literature Bureau [2014] eKLR** and **Ezra Chiloba versus Wafula Wanyonyi Chebukati & 7 others [2018] eKLR**.

In this case, the claimant was not recalled back to work to address the purpose of the administrative leave following letter dated 13<sup>th</sup> February, 2019. Even where the contract of employment allowed for termination of employment upon issuance of 4 months' notice or payment in lieu thereof, section 43 of the Act requires the employer to give reason(s) for which employment is terminated.

Where there were audit investigations and which forced the respondent to cause the claimant to go on compulsory leave, the due process of

section 41 read together with section 43 of the Act required the respondent as the employer to ensure the due process of the law. these provisions as stated in mandatory terms and requires both substantive and procedural justice.

On the one part, section 41 of the Act required the claimant be notified of his misconduct and be allowed a hearing in the presence of another employee of his choice. This was not done.

On the other part, section 43 required the respondent as the employer to give reason(s) leading to termination of employment even where there was an intention to pay for the notice period. The Court of Appeal in addressing the provisions of section 41, 43 and 45 of the Act in the case of **National Bank of Kenya versus Samuel Nguru Mutonya [2019] eKLR**, held that;

*... We are in agreement with the Bank's assertion that when the Bank terminated the respondent's employment, it did so in the exercise of its managerial supervisory power over the respondent in the discharge of his day to day duties as an employee of the Bank. We however do not agree with the*

*Bank's submission that such exercise of managerial supervisory power over the respondent in the discharge of his duties as an employee of the Bank was not amenable to scrutiny and interference by the trial court. Such a position in our view, would render nonsense the existence of the procedures provided for in sections 41, 43 and 45 of the Act. It is therefore our considered opinion that Parliament in its wisdom when enacting the Act governing the employer/employee relationships saw the need to incorporate therein provisions for redress for grievances that may arise as between the parties with regard to the discharge of their obligations under a contract of employment. This in our opinion is what forms the basis for an aggrieved party to invoke the Court's policing powers which in our view, only come into play like in the instant appeal, when there is complaint of noncompliance with the laid down legal procedures inbuilt in the Act in circumstances where the employer/employee relationship has gone sour.*

And in the case of **National Bank of Kenya versus Anthony Njue John [2019] eKLR**, the court held that under section 41 of the Act the employer is obligated to bring to the attention of the employee the action it was contemplating against him on account of his alleged poor performance, misconduct or capacity to work. It is therefore no longer the case that the contract of employment has a termination clause. Far from it. Such clause must be looked at in the context of the applicable law and particularly section 41 and 43 of the Act with regard to procedural and substantive justice.

In this case, the court finds, the respondent as the employer of the claimant failed to adhere to the mandatory provisions of the law under section 41 and 43 of the Act and this resulted in unfair termination of employment contrary to section 45 of the Act. section 49 of the Act allow for compensation of the claimant.

The claimant is seeking for payment of 4 months' notice on the basis that he was earning Ksh.116,982 per month. That his salary had been increased but the records were left in his desk upon summary dismissal.

As noted above, the employment relationship between the parties was regulated under written terms. The last record of employment is that the claimant was earning ksh.84,700. The respondent has filed a letter reviewing the salary due. this is legitimate and acceptable and without any record or request by the claimant to the respondent to produce the alleged records that his salary was increased, the court accepts the defence that the salary due was ksh.84,700.

In the letter terminating employment the respondent has offered to pay the claimant ksh.90,000 x 4 in lieu of notice. this is generous offer.

On this basis, the salary due being ksh.84,700 compensation in view of the substantive and procedural unfairness visited against the claimant is assessed at 6 months. Total compensation is ksh.508,200.

The claimant is seeking payment for the unexpired term of contract at 70 years whereas he was aged 53 years at the time. The unfair termination of employment addressed, the claimant having been under a fixed term contract, to claim for payment for 17 years until he attained age 70 has no basis.

In the case of **D.K. Njagi Marete versus Teachers Service Commission [2013] eKLR** the court held that;

*A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job ... . An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.*

In agree with findings by the court in the case of **David Wanjau Muhoro v OI Pejeta Ranching Limited [2014] eKLR**,

*The prayer for anticipatory salaries and benefits up to the age of 60 years, calculated at Kshs. 51,716,586 is rejected. It would not be a fair or reasonable remedy. As determined in the **Kenya Court of Appeal Civil Appeal No. 25A of 2013 between Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR**, Employees whose contracts of employment are terminated have no reason to sit and wait to enjoy remuneration which they have not worked for. While Employees must not be denied fair pay, for fair work actually done, they must not crave pay for doing nothing. In granting remedies for unfair termination, some of the considerations the Court takes into account are, under Section 49[4] of the Employment Act 2007, the Employee's length of service, and the number of years the Employee reasonably expected to have gone on working. The compensation granted at 12 months' gross monthly salary has taken into account the 25 years served by Muhoro, and the 10 years he expected to continue working. ...*

The claim for anticipatory salaries for 17 years is therefore found unreasonable and is hereby declined.

Similarly the claims for retirement benefits as per the church by laws chapter XIV for payment of gratuity for 26 years is not due on the principle that the church disputes resolution mechanism is herein overtaken by events and payment for gratuity is only due for years worked and not for anticipated years of service. The payment of gratuity unless covered in a collective agreement or other private treaty must be specifically be a term and condition of the employment contract.

In the last contract the claimant served under, gratuity was not an agreed term of his employment. Such claim is declined.

A certificate of service is due under the provisions of section 51 of the Act whatever the reason(s) leading to termination of employment. The claimant shall clear with the respondent and be issued with his certificate.

Under the provisions of section 17 and 19 of the Act, all terminal dues payable to an employee should be paid less what the employee owes to the employer. On the unjustified payment of salary from Ksh.84,700 to ksh.116,000 and 126,000 respectively for the period of December, 2018 until employment terminated, the respondent shall tabulate the overpayments and make a deduction from the dues awarded to the claimant.

With regard to costs, section 12(4) of the Employment and Labour Relations Court Act, 2011 the award of costs for litigation before the court is discretionary and the court may award where found fit and just. In this regard as the claimant has partly succeeded and as set out above he moved the court on good foundation, costs are awarded at 50%.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) A declaration that the claimant's employment was terminated by the respondent unfairly;**
- (b) Notice pay awarded at ksh.360,000 if not yet paid in full;**
- (c) Compensation awarded at ksh.508,200;**
- (d) The above dues at (b) and (c ) shall be paid less what the claimant is owing to the respondent;**
- (e) The claimant is awarded 50% of his costs.**

**Dated and delivered electronically this 2<sup>nd</sup> June, 2020.**

**M. MBARU**

**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 the Order herein shall be delivered to the parties via emails. this 2<sup>nd</sup> June, 2020.

**M. MBARU**

**JUDGE**