



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1994 OF 2014**

**SUSAN NJERI NDUNGU .....CLAIMANT**

**-VERSUS-**

**THE REGISTERED TRUSTEES OF THE**

**PRESBYTERIAN CHURCH OF EAST AFRICA .....1<sup>ST</sup> RESPONDENT**

**PCEA NDERI PARISH .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant's suit is contained in the Memorandum of Claim filed on 7.11.2014 in which she alleged that she was employed by the respondents as a Secretary from 9.3.2006 on permanent basis earning Kshs. 8125 plus house allowance of kshs. 3000. She further alleged that the salary was later reviewed to kshs. 14,683 plus house allowance of kshs. 6875. She also alleged that on 15.1.2014, the respondents purported to convert the employment into fixed term contract but she protested, as a result of which she was forcefully removed from the office on 16.5.2014 and later dismissed on 3.6.2014 for alleged misconduct. She contended that the dismissal was unfair because there was no valid reason and she was denied hearing. Therefore, she prayed for the following reliefs:

- a. Salary in lieu of notice**
- b. Balance of unpaid and underpaid salaries and allowances**
- c. Unpaid leave and leave travel allowances**
- d. Terminal dues and gratuity**
- e. Unremitted NHIF and NSSF deductions**
- f. General damages for unlawful dismissal**
- g. Costs of the suit.**

2. The Respondents filed defence on 9.12.2014 denying the allegation that they unlawfully terminated the services of the claimant and failed to pay her terminal benefits plus salary arrears. They averred that there was need for them to enter into new contracts for the church employees including the claimant and denied that the claimant was targeted for termination. They further averred that the claimant was sent on compulsory leave with full pay on 1.4.2014 as a result of gross misconduct prior to that date and she rendered an apology. They also averred that the claimant was subjected to disciplinary counselling sessions for 4 months as a church member and she declined as a result of which she could not be reinstated to her job. Finally, they denied the claimant's entitlement to the reliefs sought and prayed for the suit to be dismissed with costs.

3. The suit went to full hearing and both parties tendered evidence and thereafter filed written submissions.

**Claimant's case**

4. The Claimant, testified as Cw1 and told the court that she is a trained Secretary and she holds a Certificate to that effect. She further told the court that she was employed by the Respondent from 8.3.2006 as a Secretary based at the Parish Minister's Office, and her duties involved all secretarial work. She worked until 15.1.2014 when she was given a blank copy of contract forms to sign but she declined because they disqualified any one above 45 years of age yet she was 46 years. Further she declined to sign because her permanent

employment was being terminated without being paid terminal dues for the 8 years already served.

5. She further testified that as a result of the said protest, she was removed from office and later received dismissal letter dated 3.6.2014, which also directed her not to take holy communion and condemned her to undergo spiritual disciplinary counselling process before the elders. After the dismissal, she was paid kshs. 58,000 as terminal dues exclusive of other accrued benefits like salary arrears, allowances and leave.

6. She contended that as at the time of the dismissal she was receiving salary of kshs. 14,683 instead of kshs 23,978 and house allowance of kshs.6875 instead of kshs. 8600. She further stated that from 2007 to 1.10.2010, she was receiving salary of Kshs. 8125 instead of Kshs. 16,515 and house allowance of Kshs.3000 instead of Kshs.6635 equalling to kshs. 343975 for 33 months; from 1.11.2010 to 1.6.2013 salary was kshs. 14,683 instead of kshs. 19,818 and house allowance of kshs.6875 instead of Kshs.9985 equalling to kshs. 932,138 for 32 months; from July 2013 to June 2014 salary was kshs. 14,643 instead of 23,978 and house allowance of kshs. 6875 instead of kshs.8600 equalling to kshs 132,240 for 12 months.

7. She contended that from 2006, she was entitled to leave travel allowance of kshs. 2,250 per year equalling to kshs.9000 for 4 years; from 2010 to 2013, the leave allowance was increased to kshs. 15,000 equalling to kshs. 45,000; and from June 2013 to June 2014, she was entitled to half of the Kshs. 15,000. Finally, she contended that kshs. 18,200 was deducted as NSSF and NHIF were never remitted to the respective agencies and prayed for refund.

8. On cross examination, she maintained that she was employed a secretary for the Parish Minister and the whole church. However, she admitted that the salary she was receiving was agreed between her and the employer. She further admitted that the first Schemes of Service she saw was the 2010 edition under which her position as Secretary was placed under Job Scale was F and not D as alleged by the respondents. She maintained that her letter of appointment indicated her position as Secretary and contended that there was no other secretary in the parish.

9. She admitted that she received the letter dated 16.5.2014 from the employer and acknowledged receipt by signing on 24.5.2014. She further admitted that she wrote apology letter on 24.5.2014 but denied that the apology was voluntary as she did it under duress and pressure from the Parish Minister. However, she admitted that she never lodged any complaint with the police that she was forced to write the apology letter.

10. She also admitted that she received the letter dated 2.4.2014 which sent her to compulsory leave for 3 months after she declined to sign a new contract. She contended that the new contract was targeting her and it was done with malice. However, she admitted that the two security guards of the respondents were also given new contract but only one signed. She denied that she was violent and contended that the chief's officers were called in before being given the letter dated 16.5.2014 and thereafter received the dismissal letter on 8.7.2014. She contended that she asked the Parish Minister to call a meeting of elders to hear her case but he declined. Therefore she contended that she was never accorded a fair hearing before the dismissal.

11. As regards the issue of salary, she admitted that her salary for 2006 to 2007 was indicated in the appointment letter and it was all paid. However, she maintained that her claim for salary underpayment is based on Job Scale F of the Schemes of service 2010- 2013. She admitted that the salary for Job Grade D was kshs.14323 but contended that her job Scale was F and not D. She maintained that she was entitled to leave travel allowance as a Secretary.

12. On re-examination, she maintained that she was appointed as a Secretary and the appointment letter did not indicate her Job Group. She maintained that under the 2010- 2013 Schemes of Service, her position as secretary fell under Job Group F since she was personal secretary to the parish Minister. She contended that the 2010 Schemes of Service indicated the salaries and allowances from 2005. She admitted that she was never given the Schemes of Service when she was employed and the employer never revealed that there were schemes of service. She maintained that on 1.4.2014, there was an altercation when she refused to sign the new contract and Session Clerk together with the Parish Minister ordered her to go away. Thereafter the chief's officers were called in to force her out after refusing to leave the office. She maintained that she was never called to any hearing on the alleged misconduct.

### **Respondent's case**

13. Ms Joyce Nugari Ndungu testified for the respondent as Rw1. She told the court that she is an elder in the Respondent Church and when this case arose she was the Treasurer. She stated that the church had 3 employees including the claimant and it was decided that they all be put on 3 years' renewable contracts but the claimant refused while the other signed their contracts. She contended that the claimant was called by the Parish Session Clerk Ms Jacinta to be educated about the new contract but again she refused and started making noise and shouting to the Parish Minister. As a result, they reported the matter to the Chief and the claimant was summoned and in the meanwhile her office was locked.

14. Rw1 further stated that the claimant was calmed down at the Chief's office and the following day, she was served with the letter dated 16.5.2014 which she received and signed on 24.5.2014 and further wrote a letter on the same day apologizing for the misconduct. Rw1 denied that the claimant was forced to write the apology letter. She contended that the claimant never reported to work for 3 months but the respondents continued to pay her salary until 8.7.2014 when she was served with a dismissal letter. Rw1 further contended that before the dismissal the respondents paid the claimant kshs.58772 being terminal dues for the period before the proposed new contract.

15. She further testified that they placed the claimant at Job Group D according to her qualification as a Copy typist II. She further confirmed that the claimant was serving all groups and persons in the Parish. She maintained that the claimant was dismissed for misbehaving and refusal to sign a contract.

16. On cross examination, Rw1 admitted that the letter dated 16.5.2014 narrated the events of misconduct by the claimant. She further admitted that the letter does not indicate that she was present when the claimant misconducted herself but contended that she came after the

office was locked and found the claimant making noise. She also admitted that she never went to the Chief's office. On being shown the claimant's letter dated 5.3.2014 she admitted that she could not remember seeing it, however, she admitted that, by the said letter, the claimant had raised 3 complaints about the proposed new contract including benefits for the initial permanent contract, probation clause and age limit. She further admitted that the said three items were provided for in the proposed contract but she had no evidence that the employer responded to the said complaints raised.

17. Rw1 contended that the claimant was placed on 2 months' compulsory leave one day after the misconduct in April 2014 and she did handing over before proceeding on the leave. She admitted that the leave ended in June 2014 but while on leave the claimant was served with the letter dated 16.5.2014 demanding for an apology and she apologised by the letter dated 24.5.2014. She further admitted that the apology was acknowledged by the letter dated 3.6.2014 which also dismissed her and subjected her to the Parish disciplinary court. Further, that the letter suspended her from taking holy communion. However, Rw1 admitted that she had no written communication from the respondents inviting the claimant to any disciplinary hearing before the dismissal, nor did she have any minutes of any hearing accorded to the claimant before the dismissal.

18. She admitted that the claimant was employed as a Secretary vide the appointment letter dated 8.3.2006 but her Job Group was not indicated because they had not secured a copy from the head office. She also admitted that the claimant was secretary to the Parish Minister but also doing typist duties. She further admitted that page 54 of the 2010- 2013 Schemes of Service provided a column for the schemes from 2005, but she stated that they used the Government Job Grades to employ the claimant.

19. On re-examination, Rw1 maintained that the claimant refused to hear any explanation about the new contract and became violent forcing the respondent to report her to the Chief. However, she admitted that the claimant never attended disciplinary hearing before 3.6.2014 when she was dismissed. She contended that the claimant refused invitation for the hearing. She maintained that the claimant did not possess the qualifications of a secretary.

#### **Claimant's submissions**

20. The Claimant submitted that the respondent has failed to prove that there was a valid reason for the termination and that a fair procedure was followed in dismissing her as required by section 41 and 45(2) of the Employment Act. She contended that she was sent on compulsory leave for protesting against the proposed new contract of service and later she was dismissed without being accorded a chance to defend herself against the alleged misconduct. She relied on **Mary Chemweno Kiptui v Kenya pipeline Co. Ltd [2014] e KLR** where the court held that failure to follow the mandatory procedure set out under section 41 of the Act renders termination of employee's employment unfair.

21. As regards the reliefs sought, the claimant submitted that she is entitled to 12 months' salary as compensation for unfair termination by dint of section 49 (1) (c) of the Act based on the salary scale for Job Group F of the Schemes of service being Basic salary of kshs. 22791 plus house allowance of Kshs. 12000 equalling to kshs. 34,791.

22. She further submitted that she is entitled to salary arrears caused by salary underpayment from March 2007 to the date of dismissal equalling to kshs. 791,582, leave travel allowance between 2006 and 2014 equalling to kshs. 84,000 and finally, refund of kshs. 18200 being the unremitted NHIF deductions for 99 months.

#### **Respondent's submissions**

23. The Respondents submitted that the claimant was dismissed for a valid reason because she declined to sign a contract three months after being issued to her and when she was served with the letter dated 1.4.2014, she became unruly, rude and very hostile. They further submitted that they were forced to report the matter to the Chief and thereafter demanded for an apology from the claimant vide the letter dated 16.5.2014. They further submitted that the claimant apologised in writing voluntarily without any threat or coercion from them. They contended that they had no intention of dismissing the claimant but they were left with no option after the claimant became hostile and abusive.

24. They further submitted that due to the claimant's hostility and abusive conduct, it became impossible to hold any disciplinary hearing for as required by section 41 of the Employment. They contended that on several occasions, church elders were sent to calm down the claimant but she rudely chased them away and thereby rendering compliance with the due process under the Act impossible.

25. With respect to the remedies sought, the respondents submitted that the dismissal was lawfully done and as such the claimant is not entitled to compensation under section 49 of the Employment. They further submitted that the claimant is not entitled to the claim for underpaid salary contending that the claimant was not a Personal Secretary under Job Group F as alleged but a Copy Typist and accounts Clerk serving in all the areas of the respondent. However, they admitted that compared to the salary and house allowance for Job Group D under the 2010-2013 Schemes of Service, the claimant was underpaid by a total of Kshs. 30,415 which they were willing to pay to her. They further admitted that claim for refund of the unremitted NHIF deductions totalling to Kshs. 18,200.

#### **Issues for determination and analysis**

26. Having carefully considered the pleadings, evidence and submissions by both parties, it is clear that the claimant was employed by the respondent as a secretary from 9.3.2006 until 8.7.2014 when she was dismissed by the letter dated 3.6.2014 for gross misconduct. The main issues for determination are: -

**a. Whether the Claimant's dismissal was unfair and unlawful.**

**b. Whether the Claimant is entitled to the reliefs sought in this suit.**

**Whether the termination was unfair and unlawful.**

27. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

- (1) No employer shall terminate the employment of an employee unfairly.*
- (2) A termination of employment by an employer is unfair if the employer fails to prove—*
  - (a) that the reason for the termination is valid;*
  - (b) that the reason for the termination is a fair reason—*
    - (i) related to the employee’s conduct, capacity or compatibility; or*
    - (ii) based on the operational requirements of the employer; and*
  - (c) that the employment was terminated in accordance with fair procedure.*

**Was the reason for the termination herein valid and fair?**

28. The termination letter dated 3.6.2014 did not state the reason for the termination of the claimant’s employment but merely informed her that her apology was accepted and she was forgiven by the Nderi Parish Session which met on 31.5.2014. The apology letter acknowledged that her trouble started when she refused to sign new contract after sensing that she was about to lose her job; that she became emotional and uttered words which she could not recall; and that she misbehaved after becoming dispartate that she was going to be sacked.

29. The said apology was in response to the letter dated 16.5.2014 which accused her of rudeness and disrespectful conduct towards the respondents’ officials while protesting against the proposed new contract. The letter cited several instances of disrespectful and abusive language including asking “who is Njeri? this woman will see me” referring to the respondent’s Session Clerk. She was also accused of screaming and storming out of the Parish Minister’s office and threatening to do something disastrous. She further pushed the Parish Minister and four elders at the gate of the JKMC Church in an attempt to force her way into the compound in the full view of school pupils and employees of JKMC primary school. The letter further stated that the Parish Minister was the claimant’s immediate Supervisor.

30. Section 44 (4) (d) of the Employment Act provides:

*“(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—*

...

- (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;*
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”*

31. In **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** Rika J held:

*“Insubordination was defined by the Mississippi Supreme Court in the case of Sims v. the Board of Trustees Holly Springs Municipal Separate District School, 414 SO. 2d 431 [Miss. 1982], as “ a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.” Insubordination may also occur where the Employee engages his Manager or Supervisor in an un-appropriate verbal confrontation.*

*Under the Employment Act 2007, both forms of insubordination are captured under Section 44 [4] [d] and [e]...”*

32. Applying the foregoing authority to the facts of this case this case, I find that the respondent has proved that the words uttered by the claimant amounted to insubordination of the respondents’ Parish Minister, the Session Clerk and the Church Elders. The claimant admitted that she apologised for the said conduct but the employer found her misconduct conduct incompatible with employment in a church setting and terminated her services and recommended for church disciplinary process under the watch of Church elders. In my view an employee who disagrees with the employer’s proposal on change of terms of terms of service does not need to misbehave as the claimant did herein. There is no shortage of internal procedures for addressing grievances in addition to court process which is open to both employees and their employers.

**Was the procedure followed fair.**

33. Section 41 provides that:-

**“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”**

34. In this case both the Claimant and the Respondent agreed that the Claimant was never accorded any hearing. The respondent contended that the claimant was rude and hostile which prevented the employer from according her a hearing. However, the claimant contended that the respondent did not invite her for hearing on the misconduct which led to her dismissal. I have considered the evidence adduced and especially the admission by Rw1 that there was no evidence that the claimant was invited to any hearing. Therefore, I find and hold that the respondents have not proved that they accorded the claimant a hearing before dismissing him on the said misconduct and as such the termination was rendered unfair for failure to follow a fair procedure.

35. I gather support in **Standard Group Limited v Jenny Luesby [2018]** eKLR the Court of Appeal held:

**“With respect, we think the trial court was on firm ground in such finding. As stated above, the procedure under section 41 of the Act is mandatory. Apart from a mere assertion that there was an attempt made on 14th November, 2013 in a meeting with the HR Director and respondent in the CEO’s office, where the incident was discussed and the respondent is said to have apologized, there was nothing on record to show that the requirements of section 41 were complied with...**

**It follows that the act of summarily dismissing the respondent without giving her an opportunity to be heard amounted to unfair termination as defined in section 45 of the Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure.' See Kenfreight (E. A) Limited vs Benson K. Nguti, [2016] eKLR.”**

#### **Whether the Claimant is entitled to the reliefs sought**

36. Having found that the dismissal of the claimant was unfair and unlawful, I make a further finding that the claimant is entitled to salary in lieu of notice plus compensation for the unfair dismissal by dint of section 49 (1) of the Employment Act. She will get one month’s salary in lieu of notice because under the appointment letter dated 8.3.2006 she was entitled to one month notice before termination. She will also get six months’ gross salary as compensation for unfair termination considering her 8 years’ service and also the fact that she contributed to the termination through misconduct. The applicable salary is what she was entitled to under the 2010- 2013 Schemes of service.

37. The parties differed on the claimant’s salary but they agreed that she was appointed as a secretary based in the Parish Ministers Office. It is also common ground that she was serving the minister plus all other groups and persons in the parish. The appointment letter in PART TWO stated as follows in part:

#### **“JOB DESCRIPTION**

**JOB TITLE: SECRETARY**

**Office: P.C.E.A. NDERI PARISH OFFICE**

**SUPERVISOR: PARISH MINISTER**

#### **DUTIES**

**(i)...**

**(iii) All secretarial work of the Parish Office, Parish Session, all Parish Groups and any other office work if called upon by your Supervisor.**

**(iv)...”**

38. In view of the foregoing description, the claimant’s role fell under Job Scale F in the category of Administrative Assistant in the Parish office which was also the office of the Parish Minister. In my view, Administrative Assistant and a Secretary mean one and the same. The two positions refer to person who is employed in an office by an individual or organization *inter alia*, to receive telephone calls and letters, keep office records, type documents, manage and schedule appointments, and handle visitors to the office.

39. In this case the claimant may not have possessed the qualifications required under the Schemes of service for that position but Rw1 confirmed that when they appointed that claimant, they had not obtained copy of the Schemes of Service from the Head Office. That omission cannot be blamed on the claimant. In any event there was no evidence adduced to prove that she was not performing her duties as required.

40. Having found that the claimant's position fell under Job Scale F, I agree with the claimant that she was entitled to the salary and allowances under Scale F being kshs. 22,791 plus kshs. 12,000 equalling to kshs. 34,791 which I award her as salary in lieu of notice. As regards compensation, I award her kshs 34791x 6 = kshs. 208,746.

41. The claim for the unremitted NHIF deductions of Kshs. 18,200 is allowed because it was admitted vide the written submissions by the respondents. The claim for gratuity is however declined because it is not grounded on the contract of service. Besides, the claimant has produced pay slips showing that he was a contributing to the NSSF and pension.

42. The claims for underpaid salary, leave and leave travel allowance are declined for lack of particulars in the pleadings. Although the claimant attempted to explain the alleged underpayment of salary, by evidence she did not amend the pleadings. Parties are bound by their pleadings. However, since in their

written submissions, the respondents admitted that they are willing to pay the claimant kshs. 30,415 as underpaid salaries, I award that amount to her.

### **Conclusion and disposition**

43. I have found that the termination of the claimant's employment contract was unfair within the meaning of section 45 of the Employment Act because it was done without following a fair procedure. I have also found that the claimant is entitled to compensation by way of damages. consequently, I enter judgment for the him in the following terms: -

Notice	kshs. 34,791
Compensation	kshs. 208746
underpaid salary	kshs. 30,415
NHIF refund	<u>kshs. 18,200</u>
<b>Total</b>	<b><u>kshs. 292,152</u></b>

The above award is subject to statutory deduction but the Claimant will also have costs and interest at court rates from today.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of October, 2020.**

**ONESMUS N MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**