



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 653 OF 2015

JANE AWINO MALOWA.....CLAIMANT

V

ST ANNE'S ACK CHURCH.....RESPONDENT

JUDGMENT

1. Jane Awino Malowa (Claimant) instituted legal proceedings against St. Anne's ACK Church (Respondent) on 2 April 2015 alleging unfair termination of employment and *breach of contract/statute*. The Claimant sought a total of Kshs 283,530/60.

2. In a Statement of Defence filed on 25 June 2015, the Respondent denied that it unfairly terminated the Claimant's employment and contended that the Claimant was a volunteer. Breach of contract was also denied.

3. On 17 July 2018, the Claimant filed an *Amended Memorandum of Claim* introducing head of claim for house allowance, and increasing the total claim to Kshs 353,107/73.

4. The Cause was heard on 1 April 2019. The Claimant testified while the Respondent opted to close its case without leading evidence.

5. The Claimant filed his submissions on 25 April 2019 while the Respondent filed its submissions on 10 June 2019 (should have been filed by 2 June 2019).

6. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as set out in the Claimant's submissions but slightly amended, to wit:

- i. Whether Claimant was an employee or a volunteer
- ii. Whether there was unfair termination of employment
- iii. Appropriate remedies and Orders.

Employee or volunteer

7. In resisting the Claimant's assertion that the Claimant was its employee, the Respondent pleaded that the Claimant was part of the volunteer ministry from June 2011 and was merely paid an allowance of Kshs 4,200/-.

8. In its submissions, the Respondent urged that section 10(7) of the Employment Act, 2007 did not apply as the dispute did not concern a *term* of employment.

9. The Claimant, on her part testified that she was employed on 6 June 2011 as a nursery school teacher after an interview but was not issued with a formal contract, and that her salary was increased from Kshs 4,200/- to Kshs 7,000/-.

10. Although there is no statutory requirement in the Employment Act, 2007 or in any other statute for that matter, to put into writing a *volunteer* contract, the Respondent should have reduced into writing the nature of relationship it had with the Claimant.

11. The Respondent did not lead any evidence to rebut the Claimant's testimony which was given under oath that she was an employee, and the Court will find the testimony triumphs over the Respondent's mere contentions.

12. The Court therefore finds that the Claimant was employed as a nursery school teacher from 6 June 2011.

Unfair termination

13. The Claimant's testimony was that on 13 April 2014 she was formally interviewed for the position of nursery school teacher after which she was informed to wait for further communication.

14. The communication came from the Church Treasurer Evans Oningo who informed her that another person had been employed.

15. According to the Claimant, she was not afforded a hearing before termination of employment nor were the reasons given.

16. The Court has reached a conclusion that the Claimant was an employee. The Respondent, it appears decided to recruit a person with formal qualifications in *early childhood education* (the Claimant admitted that she did not possess any formal qualifications as a nursery school teacher).

17. The Respondent should have formally brought the oral contract/relationship to an end. It did and the Court finds there was unfair termination of employment.

Compensation and pay in lieu of notice

18. The Claimant served the Respondent for about 3 years, and in consideration of the length of service, the Court is of the view that the equivalent of 3 months' salary would be appropriate compensation.

19. The Court also would award the Claimant the equivalent of 1 month pay in lieu of notice.

Breach of contract/statute

Underpayments

20. The Claimant sought underpayments from June 2011 to April 2014, a total of Kshs 123,165/- and anchored the heads of claim on *Regulation of Wages (General)(Amendment) Orders* for 2011, 2012 and 2013.

21. The Claimant, in her submissions made reference to the prescribed wage for a *general labourer*.

22. The *Regulation of Wages (General)(Amendment) Orders* do not prescribe the minimum wage for nursery school teachers.

23. Consequently, the Court finds no basis for equating the prescribed wage for a *general labourer* as applying to a nursery school teacher.

24. This head of claim was not proved to the required standard.

Leave pay

25. The Claimant sought commuted leave pay for the 3 years of service.

26. Section 28(4) of the Employment Act, 2007 circumscribes the leave which can be carried forward to maximum of 18 months. The Claimant therefore cannot validly lay claim to untaken leave for 3 years.

27. On evidential basis, the Claimant did not demonstrate that she applied for leave and the Respondent declined to grant the same. In the circumstances, this head of claim is declined.

House allowance

28. Under this head of claim, the Claimant sought Kshs 49,882/- and used a global monthly salary of Kshs 9,780/-.

29. This was in the nature of special damages. There was no evidence as to when the salary was increased from Kshs 4,200/- to Kshs 7,000/-. Even the prescribed minimum wage was not static for the 3 years.

30. The Court declines to make any award under this head.

Service pay

31. The Claimant testified that she was not a contributor to the *National Social Security Fund*. She therefore sought Kshs 14,671/- as service pay.

32. By dint of section 35(5) & (6) of the Employment Act, 2007, the Court will allow the head of claim.

Conclusion and Orders

33. The Court finds and declares that the Claimant was an employee of the Respondent, and that her employment was unfairly terminated.

34. The Claimant is awarded

(a) Compensation Kshs 21,000/-

(b) Pay in lieu of notice Kshs 7,000/-

(c) Service pay Kshs 14,671/-

TOTAL Kshs 42,671/-

35. Claimant to have costs of Kshs 20,000/-.

Delivered, dated and signed in Nairobi on this 12th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onenga instructed by Omongo Onenga & Co. Advocates

For Respondent Mr. Kahura instructed by Kaplan & Stratton Advocates

Court Assistant Lindsey