



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 298 OF 2015

(Before Hon. Justice Mathews N. Nduma)

MOSES OMONDI OWUOR.....CLAIMANT

VERSUS

REV. ROTICH, CLEMENT OTIENO OGUTA AND DOROTY ONYANGO

(Sued as the Chairman, Secretary & Treasurer of the Pentecostal.....1ST RESPONDENT

THESSALLIA MISSION CENTRE BOARD OF GOVERNORS.....2ND RESPONDENT

JUDGMENT

1. The claim was brought on 7th August 2015 against the 1st and 2nd respondent seeking maximum compensation for unlawful dismissal and terminal benefits that include payment in lieu of notice, prorata unpaid leave and unpaid salary for the month of August 2012.
2. The claim is based on the testimony of CW1, the claimant before court and summarized in a witness statement filed on 7th August 2015.
3. The claimant testified that he was employed by the respondents as a field operator from the year 2000 and worked continuously until the 18th August 2012 when he was summarily dismissed. The summary dismissal was verbal. That he was paid Kshs. 6,000 gross salary per month. Claimant testified that the supervisor told him his work was over. That he should not ask any question since he was just a casual. That he was not given notice nor paid in lieu of notice, was not paid salary for days worked in August and was not paid for leave days not taken in the year 2012. That the dismissal was unlawful and unfair and he be compensated.
4. The respondent called RW1, Clement Otieno Oguta who testified that he was a pastor and administrator of the 2nd respondent. That CW1 was a youth member of the church and became a lay leader. That RW1 was his supervisor. That he worked with a team handling HIV & AIDS matters from the year 2000 which RW1 headed. That CW1 was the pillar of the programme. He stood out and the church asked RW1 to assist him.
5. RW1 allowed him to supply vegetables and charcoal to the mission school. That RW1 was close to CW1 and gave him casual jobs from time to time in the sugar farm and kept sugar delivery records during harvesting. During the maintenance season CW1 did weeding and supervised other casual workers. That CW1 did not get letter of employment from Nairobi Head Office which was mandated to employ permanent staff.
6. RW1 faulted documents produced by CW1 from the co-operative society as evidence of his employment. RW1 insisted that the claimant was not given any permanent job by the respondents. RW1 prayed that the claim be dismissed for lack of evidence.
7. RW1 stated that the claimant was employed as and when there was work to be done and never earned a monthly salary. RW1 admitted that on 18th August 2012 he told the claimant that there was no work to be done due to cash flow problems. RW1 did not allocate CW1 any work on the day. That RW1 was a piece rate worker. RW1 prayed the suit be dismissed with costs.

Determination

8. In terms of Sections 107, and 108 of the Employment Act, 2007, an employee bears the obligation to prove that he was an employee protected under part (v) and (vi) of the Employment Act, No. 11 of 2007 in that he was employed on continuous terms and was neither a

casual nor a piece rate worker.

9. The claimant adduced evidence that he worked for the respondents from the year 2000 to the year 2012 but was not given a letter of employment nor had a pay slip. That he did various jobs in the field and was a supervisor and earned Kshs. 6,000 per month. The claimant did not produce any documentary evidence to confirm these assertions.

10. On the other hand, RW1 testified that at all material times, CW1 who was a youth leader at the church, was given various piece rate jobs to support him because of his good leadership skills especially in the HIV & AIDS Programme under the Pentecostal church.

11. That the claimant did various manual and supervisory jobs as and when work was available especially during cane harvesting season and during the maintenance season when he weeded the fields and supervised other casuals.

12. The court is not satisfied that the claimant has proved on a balance of probabilities that he was a permanent employee employed by either the 1st or the 2nd respondent. The court is satisfied that the claimant had a good relationship with RW1 who in return called upon the claimant to provide various services to the church and the mission's centre including supplying vegetables and charcoal to the mission school and at times doing manual and supervisory jobs in the sugar farm.

13. The court is satisfied that the relationship between the claimant and the respondents did not graduate into a permanent employment relationship.

14. The court finds that the claim that the claimant was unlawfully and unfairly summarily dismissed lacks merit and is dismissed.

15. With regard to the claim for arrear wages for 18 days worked in the month of August 2012, the court finds that the claimant was a piece rate worker and has not shown what work he did between the 1st and 18th August 2012. This claim has not been sufficiently proved and is also dismissed.

16. Regarding the claims for payment in lieu of notice and prorata leave, the court having found that the claimant was employed on piece rate basis finds no merit in these two claims and equally dismisses the same.

17. The claimant had a long good relationship with the respondents for the mutual benefit. The respondents are religious organizations and the claimant was their member. I find this an appropriate case where the parties are to bear their own costs of the suit.

Judgment Dated, Signed and delivered this 18th day of September, 2019.

Mathews N. Nduma

Judge

Appearances

Mr. Ayuw for claimant

Mr. Kirui for Respondent

Chrispo – Court Clerk