



**REPUBLIC OF KENYA**

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

**CAUSE NO.60 OF 2015**

**DANIEL AKHUTU WEME.....CLAIMANT**

**VERSUS**

**CATHEDRAL OF CHRIST THE KING PARISH .....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent in January, 2007 as a general staff.

The claim is that the claimant was paid a wage of Ksh.6, 500.00 as basic pay and without a house allowance and upon several requests the wage was increased to ksh.7, 040.00 from August, 2012 and which amount he earned until his employment was terminated on 10<sup>th</sup> May, 2014.

The claim is also that the respondent underpaid the claimant contrary to the wage orders. The claimant would work from 6.30am to 7pm daily without a break and on public holidays without compensation save for Sundays which was his off days. In the month of April, 2014 the claimant was not allowed an off day due to work demands and such time was not paid for. The annual leave due for the period of January, 2013 to January, 2014 was not allowed or paid in lieu thereof.

The claimant's case is also that on 10<sup>th</sup> May, 2014 he was arrested while on duty on allegations of theft he was taken to central police station Nakuru to record statements and then locked in custody. He claimant was then charged in court and then remanded in custody. The claimant applied for bond and was allowed Ksh.20, 000.00 and released on 16<sup>th</sup> May 2014.

The respondent then withdrew the case prematurely and the claimant was set free. He went to ask for his salary for 10 days worked in May, 2014 and to report to work but was informed that his services were no longer required and his salary was not paid. The respondent acted in bad faith and contrary to section 35, 41 and 45 of the Employment Act.

The claimant had worked for 7 years and 4 months without warning or record of misconduct. He claims for;

- a) Notice pay Ksh.10,377.75;
- b) Underpayments Kh.92,868.60;
- c) Overtime Ksh.382,432.40;
- d) Work during public holidays ksh.66,282.05;
- e) Off duties Ksh.283,841.50;
- f) One year annual leave Ksh.7,264.40;
- g) 10 days salary in May, 2014 Ksh.4,324.00;
- h) Compensation Ksh.124, 533.00.

The claimant testified in support of his claim that he was employed by the respondent as a cleaner from the year 2007 to 2015 and where he was underpaid, worked overtime without compensation, was at work during public holidays and was not allowed to take his annual leave due in the period of the year January, 2013 to 2014. When he had a problem at home he would be given 3 to 4 days off.

The claimant also testified that he left the employment of the respondent in March, 2015. The respondent alleged that he had stolen which was not true. The Priest would send him to make purchases and for the entire period of his employment he had no case of theft. That his wage due for March, 2015 was not paid.

The claimant was arrested over the alleged theft; the Priest then called him back to work but later he was told he had been replaced and thus dismissed from his employment.

In cross-examination the claimant testified that he left his employment with the respondent in March, 2015 around the 27<sup>th</sup> and his pleadings that he was dismissed on 10<sup>th</sup> May, 2014 is not correct as he left his employment in March, 2015. He was accused of stealing and arrested on 28<sup>th</sup> March 2015 and released on bond on 16<sup>th</sup> May, 2014.

The claimant also testified that he was never issued with an employment contract and what was paid he had to sign a voucher. He was not employed by the Catholic Diocese of Nakuru but the respondent.

The criminal case against him proceeded for hearing and the Priest withdrew it following discussions with his family over alleged stealing of cash. The criminal case followed a complaint by the respondent.

The claimant also testified that he was resident within the respondent's premises. He returned to work after released from custody and in March, 2015 he was told he had been dismissed.

#### Defence

In response the defence is that on 11<sup>th</sup> December, 2010 the claimant was employed by the respondent as a general worker and issued with a contract. He was paid and also housed by the respondent and thus not entitled to a house allowance as alleged. The wages paid were increased over time. The claims made for overtime work do not arise as there was no such work.

The defence is also that the claimant was allowed to go on annual leave when he applied for taking off such time.

The claimant then absconded duty and to date remains at large.

The claimant was arrested and charged in court over theft after he was caught stealing from the offertory box and on humanitarian grounds, the respondent dropped the complaints made against him. The claimant has since not resumed duty or been informed that his employment was terminated as alleged. The claims made should be dismissed with costs.

In evidence Fr. Evans Kulei a Priest at the respondent testified that he worked with the claimant who was a general worker and on 10<sup>th</sup> May, 2014 the claimant was reported to have broken into the church collection safe. At the time the witness was at a church function in Bahati when he was called and informed of the incident. The claimant together with his friend Ochanda were arrested before he arrived and taken into police custody.

Fr. Kulei also testified that the church administrator gave him instructions to pursue the case and he recorded a statement with the police over the incident. Money and cheques were recovered amounting to Ksh.60, 000.00 and there were two eye witnesses Moses the cook and Boniface the watchman and Modern Security personnel who had arrested the claimant.

Fr. Kulei also testified that the claimant was charged in court with theft and during the hearing of the case he saw the two accused persons including the claimant, their wives and children who looked desperate and was moved with compassion and upon consultation with the church administrator, Fr. Lawrence Mbogo and the Bishop and who gave him the go ahead to pardon the claimant and withdraw the case. He went to court and withdrew the criminal case. Since then he never saw the claimant again and there was no letter of termination of employment.

Fr. Kulei also testified that the claimant was a cleaner and would report on duty at 8am to 5pm for 6 days a week and upon application he was allowed annual leave. During public holidays the claimant would not be at work as a general worker watering and cleaning duties and would not be required to work overtime.

Upon cross-examination, Fr. Kulei testified that the claimant would report to work at 8am and there was a clocking and exit at 5pm and the nature of duties did not require work overtime. The claimant was paid Ksh.10, 000.00 per month.

The criminal case was withdrawn after hearing had been commenced and the magistrate accepted. Before Fr. Kulei was to testify, Boniface and Moses had given their testimonies.

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

The pleadings and the evidence of the claimant are not in tandem.

Paragraph 5 of the Memorandum of Claim is that the claimant was arrested on 10<sup>th</sup> May 2014 and charged with theft and was released on 16<sup>th</sup> May, 2014 and when he reported back to work he was dismissed.

In his evidence the claimant was assertive that he worked for the respondent until March, 2015 following his arrest on 28<sup>th</sup> March 2015 and

when he returned to his employer he found he had been replaced.

The claimant was questioned by the respondent at length on these contradictions and denied that the details in the Memorandum of Claim relate to him. He further confirmed that upon arrest he was released on bond paid for by John Otieno Abuom and he never reported back to his employment.

The claimant is represented by counsel and who drafted the pleading, his statement and Verifying Affidavit to confirm that what is stated in the filed pleadings is correct. The respondent thus defended the suit on what was pleaded.

The claimant testified that he was arrested and charged in court following complaints by the respondent. He was released on bond of Ksh.20,000.00. The Claimant attached annexure "APPX2" is the bond dated 16<sup>th</sup> May, 2014 this meaning the arrest and charge in court occurred on or around this date of May, 2014 and not 2015.

With the claimant denouncing his own claim, his word contradicting the pleadings in a material way, the evidence before court is thus without a foundation.

The above put into account, the claim of termination of employment on the pleadings and evidence of the claimant and that such was unfair and notice pay was due is compromised. By his own claims and testimony, challenged in defence there is no notice of compensation due.

The claimant has also made claims of underpayments, overtime work, work during public holidays, off days, 10 days worked in April, 2014 and annual leave for a year. These shall be analysed on the merits.

The respondent did not attach the contract of employment setting out the terms and conditions of employment. The failure to produce work records upon filing suit is contrary to section 10(3), (6) and (7) of the Employment Act, 2007.

On this basis the court must review the evidence on the word of the claimant.

On the conflicting evidence on the end date for employment, the court shall apply the conservative date of 10<sup>th</sup> April, 2014 noting the records filed speak to this date and the pleadings served on the respondent related to termination of employment on this date and the claims made are premised on this date.

On underpayments upon employment of the claimant on 11<sup>th</sup> December, 2010 the wage due to a general worker was Ksh.6, 221.00 per month.

The claimant was paid Ksh.6, 500.00. The claimant testified that he was housed by the respondent and cannot claim for a house allowance. The payment of Ksh.6, 500.00 was an overpayment.

For the period of May 2011 to April, 2012 the basic wage was ksh.6, 999.00 and the claimant was paid Ksh.6, 500.00 and underpayment of Ksh.499.00 each month all being ksh.5, 988.00 for the period.

From May, 2012 to April, 2013 the minimum wage was Ksh.7, 915 and the claimant testified he was paid Ksh.7, 040 in the year 2012 the underpayment being Kshs.875 each month all being Ksh.10, 500.00 for this period.

For the period of May, 2013 to April, 2014 the minimum wage was ksh.9,024 and the claimant testified his last wage was ksh.10,700.00 such being an overpayment.

Total underpayments awarded are ksh.16, 488.00.

On the claims for overtime pay, the evidence by the respondent was not challenged in any material way that the claimant as a general worker with duties to clean and water grass was from 8am to 5pm for 6 days each week and that there was a clocking system and though not produced the examination of the witness was firm and unwavering that there was no overtime work.

The claimant having been housed by the respondent cannot claim to start work early or end late on this basis. The benefit of housing put into account and being a requirement under the provisions of section 31 of the Employment Act, 2007 put into account, cannot be applied to negate the very right secured to mean there was work overtime.

Similarly, the claims for work over public holidays and off days cannot stand on the basis that the claimant was housed by the respondent and by not taking such time off and remaining resident in the allocated residence does not translate to a requirement to be at work. Such claims are therefore lost.

However, the taking of annual leave is a right under section 28 of the Employment Act, 2007. The employer should ensure the employee has taken such leave each year or make a payment in lieu thereof. The failure by an employee to take annual leave and a defence that there was no application should not be visited against the employee. The failure by the respondent to file any work records to show how such annual leave was allocated and or taken, this becomes due. The claimant is seeking payment for annual leave not taken for January, 2013 to January, 2014 and this is awarded at ksh.7, 264.40.

There is also no evidence that the claimant was paid for the 10 days worked in April, 2014 following his arrest and being charged in court. On the wage due at Ksh.9, 024.00 the claimant is entitled to ksh.3, 008.00.

**Accordingly, judgement is hereby entered for the claimant against the respondent with an award of underpayments at Ksh.16,488.00; pay for 10 days worked in April, 2014 Ksh.3,008.00; and each party shall bear own costs.**

Delivered at Nakuru this 24<sup>th</sup> day of October, 2019.

**M. MBARU**

**JUDGE**

In the presence of: .....