



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 217 OF 2018

JOHN GICHUHE NDEBE.....CLAIMANT

v

ELIKANA NDIRANGU.....1st RESPONDENT

LUCY MAITAI.....2nd RESPONDENT

FRANCIS MUCHIRI.....3rd RESPONDENT

RIRUTA BAPTIST CHURCH.....4th RESPONDENT

JUDGMENT

1. John Gichure Ndebe (Claimant) was offered employment as a Pastor by Riruta Baptist Church (Respondent) through a letter dated 26 July 2016.
2. The offer was subject to a 6 months' probation during which period it could be terminated by 7 days' notice.
3. On 27 November 2017, the Respondent wrote to the Claimant informing him that due to *immorality, lack of integrity, lack of accountability, poor performance and absenteeism*, his contract would not be confirmed.
4. The Claimant was aggrieved and on 23 February 2018, lodged the instant proceedings alleging unfair termination of employment.
5. In its *Response* filed on 24 April 2018, the Respondent contended that the termination of the Claimant's employment was lawful and that he was not entitled to any of the reliefs sought.
6. The Cause was heard on 21 January 2019 and 26 June 2019. The Claimant and the 1st to 3rd Respondents testified.
7. The Claimant filed his submissions on 19 July 2019 while the Respondent filed its submissions on 2 August 2019.
8. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

9. The Claimant's contract provided for 6 months' probation. The Claimant served beyond the 6 months without any formal notification from the Respondent whether he had been confirmed or not.
10. In the circumstances, the Court finds that the Claimant was presumed confirmed, and was therefore entitled to 3 months' notice of termination in terms of the contract (section 35(1)(c) of the Employment Act, 2007 also requires written notice).
11. There was no evidence that the Respondent issued a notice to the Claimant.

12. Apart from the notice under section 35(1)(c), section 41 of the Employment Act, 2007 contemplates affording an employee an opportunity to be heard before termination of employment.

13. The Respondent produced minutes of a meeting held on 2 October 2017. The minutes suggest that the Claimant was afforded an opportunity to make representations in response to the allegations which caused the termination.

14. Despite the hearing, the Court finds that the termination of the Claimant's employment through the letter dated 26 July 2016 was procedurally tainted for lack of prior written notice.

Substantive fairness

15. Sections 43 and 45 of the Employment Act, 2007 require the employer to not only prove the reasons for terminating the services of an employee but that the reasons are valid and fair.

16. Section 45(4) of the Act prescribes that a decision to terminate should also be in accord with justice and equity

17. The Court has looked at the minutes of 21 October 2017. The text and tenor thereof show that the members resolved to give the Claimant time to reconcile and seek forgiveness.

18. It was not disclosed when and who altered the resolution(s) to terminate the Claimant's employment.

19. Without such evidence, the Court is of the view that the termination of the Claimant's contract was not in accord with justice and equity.

Appropriate remedies

Pay in lieu of notice

20. Since the Claimant was not given notice as contemplated by law, the Court finds that he was entitled to the equivalent of 3 months' salary in lieu of notice (basic salary was Kshs 40,000/-).

Service pay

21. The Claimant sought Kshs 39,663/- on account of *service pay*. There was no evidence that the Claimant was a member of a pension scheme or was contributing towards the *National Social Security Fund*, and the Court will allow this head of claim.

Compensation

22. The Claimant served the Respondent for slightly over a year. He was providing spiritual nourishment to the flock of Christ. He was and is a fisher of souls.

23. In the view of the Court, this is not a fit case to award compensation.

Conclusion and Orders

24. The Court finds and holds that the termination of the Claimant's employment was unfair for failure to give notice of termination and was also not in accord with justice and equity, and awards him

(i) Pay in lieu of notice Kshs 120,000/-

(ii) Service pay Kshs 39,663/-

TOTAL Kshs 159,663/-

25. Each party to bear own costs.

26. The Court regrets that it could not deliver this judgment on 27 September 2019 due to other official commitments.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Onyango instructed by Mwaure & Mwaure Waihiga Advocates

For Respondents Mr Kirwa instructed by Kirwa Koskei & Co. Advocates

Court Assistant Lindsey