



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2002 OF 2016

JOSEPHAT MAKHULE ATSANGALALA.....CLAIMANT

VERSUS

ARCH ANGEL MICHAEL ORTHODOX CHURCH.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 28.09.2016 in person. The claimant prayed for judgment against the respondent for:

- a) Notice pay Kshs.10, 000.00.
- b) Compensation for unfair termination Kshs.10,000.00 x12=Kshs.120,000.00.
- c) Service pay Kshs.10,000.00 /30 x 15 x 9years = Kshs.45, 000.00.
- d) Annual leave pay Kshs.10,000.00 x/30 x21 x 9years = Kshs.63,000.00.
- e) Salary for May 2016 Kshs.10,000.00.
- f) Total Kshs.248,000.00.
- g) Costs of the suit.
- h) Interest.
- i) Any other relief as the Court may deem just.

The claimant has pleaded that he was employed by the respondent as a Gardener at monthly pay of Kshs.10, 000.00 and effective 01.01.2007. His further case is that he served until 01.06.2016 when the respondent terminated his employment without due procedure as per section 41 of the Employment Act, 2007. Thus the summary dismissal is alleged to have been unfair.

The statement of response was filed on 05.01.2017 through Guandaru Thuita & Company Advocates. The respondent prayed that the suit be dismissed with costs. The respondent's case is that it did not employ the claimant and that it only had volunteer workers or independent contractors. The respondent states that it occasionally hired the claimant to perform specific chores and the relationship would end once such assignments had been completed. Thus the claimant was an independent contractor who offered his services to any willing client. In such circumstances, the respondent urges that the Employment Act, 2007 does not apply to the dispute.

The **1st issue** for determination is whether the respondent employed the claimant. The claimant testified that the respondent employed him in January 2007 as a cleaner and Gardener at the church and he was terminated on 01.06.2016. His monthly pay was put at Kshs.10,000.00. The claimant's testimony was that on 01.06.2016 one Njoroge Njeri (the priest at the church) found the claimant at work and told him that his employment had been terminated. He was not a member of NSSF and he claimed per the memorandum of claim. The claimant testified that the church was run by a committee of elders some of whom were in Court. The claimant testified that it was Simon Njoroge Njeri who interviewed him in January 2007 and employed him as a Gardener to keep the church premises clean. His evidence was that the employment was verbal. His further evidence was that he was paid in cash and he was the only person employed by the respondent. He denied that during

his employment with the respondent he worked with Gichuki Securities as a watchman.

The claimant's witness No.2 (CW2) was his brother Kenneth Ingosi. His evidence was that while the claimant was employed by the church, he worked at the church as a casual worker at the construction works. He stated that he witnessed Njoroge terminate the claimant's employment and the claimant was not paid terminal dues. CW2 testified that he worked with the masons as a casual labourer while the respondent employed the claimant as a Gardner. CW2 testified that the said Njeri paid CW2 on Saturdays for weekly done job.

The respondent's case was that the claimant was a casual worker engaged from time to time on need basis and that at the material time the claimant was employed by Gichuki Securities as a guard so that he could not have been employed by the respondent on full time basis. The respondent's Witness No.1 (RW1) was James Gituri. His evidence was that on 01.06.2016 the claimant had been assigned together with CW2 to lift some building stones at Kshs.2.00 per stone lifted. The claimant finished the job and on the same date there was timber for roofing delivered at the church. Njoroge assigned the claimant to take the timber near the church Kitchen for secure keeping but the claimant refused. The claimant was then paid for the stones and he left. The claimant was then paid for the stones and he left. RW1 testified that there was a lady known as Mama Charles (deceased) who at the material time used to clean the church. RW1 further testified that the Church had a Father, Committee and a Council of Church Officials. RW1 testified that the claimant was given casual or contractual jobs and was not a permanent employee. Further the claimant worked for Gichuki Securities as a guard at Kinoo and at one time he was arrested but RW1 and other respondent's members intervened and the claimant who had been arrested was released by the police. The clearing of grass at the church was seasonal taking 3-4 days and the claimant was paid Kshs.500.00 for a day's job.

The respondent's witness No. 2 was Simon Njoroge Njeri (RW2). His evidence was that in 2007 the respondent started engaging the claimant as a casual labourer. He broke in service sporadically based on the phases of the construction works. At that time the claimant was paid by the building contractor so that the respondent kept no records on the claimant's payments. RW2's testimony on events of 01.06.2016 was similar to that by RW1 and that on that date the claimant declined the assignment to carry the timber because he proposed a pay of Kshs.500.00 but which RW2 considered to be too high.

The court has considered the evidence. The Court finds that there is no reason to doubt the respondent's case that the claimant was engaged as a casual worker on need basis to clear the grasses at the church compound, on the construction works and other available jobs. While making that finding the Court finds that the claimant has failed to account for the assigned work without a break from January 2007 to 01.06.2016. Accordingly, the Court finds that the parties were in sporadic contracts of service in which the claimant served as a casual worker.

To answer the **2nd issue** for determination, the claimant testified that he was a member of the respondent church. The Court considers that he must have been aware of the Father, Committee and Council. The Court finds that the suit was defective to the extent that the claimant failed to sue the church in the names of its officials. As submitted for the respondent, the Court follows **African Orthodox Church of Kenya - Versus- Charles Omuroka & Another [2014]eKLR**, thus, **"There is no doubt therefore, that both the Plaintiff and the 2nd Defendant as societies or associations registered under the Societies Act are not legal entities capable of suing and being sued in their own names. They have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. They can only sue through Trustees, if they have one, or in the names of their officials in a representative capacity."**

To answer the **3rd issue** for determination, the Court returns that since the claimant had been engaged on casual basis by the respondent's officials on 01.06.2016, the engagement lapsed on the material date and the end of the day. In view of the finding that parties were in casual contract of service, the prayers as made for the claimant will fail. Since it is confirmed that the respondent is not a person in law, there will be no orders on costs.

In conclusion, judgment is hereby entered for dismissal of the claimant's suit with no orders on costs.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 19th December, 2019.**

BYRAM ONGAYA

JUDGE