REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 442 OF 2015

KENYA UNION OF EMPLOYEES OF

VOLUNTARY AND CHARITABLE

ORGANIZATIONS (KUEVACO).....CLAIMANT

VERSUS

ST JOSEPH CATHOLIC CHURCH

JERICHO PARISH.....RESPONDENT

JUDGEMENT

Preamble

1. It is not normal for a court to start its judgement with a preamble however, the circumstances of this case calls upon the court to do so in the interest of speedy disposal of cases.

2. The memorandum of claim dated 20th March, 2015 and filed in this court on 23rd March 2015 presents a perfect example of bad pleadings. The drafter Mr Odin Boaz Otieno (JANITOR) describing himself as the as the Secretary General of the claimant union appeared to have lacked clarity of thought and precision in pleading the grievants case. The drafter seemed to have been laboring from unprecedented avalanche of confusion in thought hence was unable to discern between factual aspects of the claim which required simply pleaded and argumentative legal question which should be preserved for submissions.

3. The drafter therefore ended up presenting to the court a document purporting to be a statement of the grievant claim. This document lacked clarity on what exactly the grievant was claiming. This style of drafting is becoming common with a fair union and ought to be discouraged. Pleadings must be kept concise and simple to enable the court understand the nature of the claim and the remedy sought.

4. That having been said the grievant herein seem to claim he was verbally employed on 2nd April, 1996 as a security guard. The respondent later issued him with a written 2 year contract dated 1st August, 2009 without considering his privileges and benefits from April, 1996. These benefits included overtime, leave NSSF contributions and terminal benefits.

5. The respondent on its part for admitted that the grievant was employed by an oral contract in April, 1996 but was later on 1st August, 2009 placed on a two year contract to run upto 31st July, 2011. The respondent denied the written contract was belated since the grievant agreed to an oral contract between April 1996 and 1st August, 2009 and that he voluntarily signed the written contract on 1st August, 2009 having read and understood the same. The respondent further pleaded that the grievant was issued with a letter of termination of his services on 28th March, 2011. The respondent further pleaded that upon termination of his services the grievant was paid all his terminal dues. Further as per the contract, the claimant would have been entitled to payment of equivalent of 15 days of work for every year worked but subject to his contract not being terminated.

6. The respondent further pleaded that valid reasons for termination for gross misconduct were set out in the letter of termination dated 28th March 2011 being leaving his place of work without prior permission, irresponsibility and lack of interest at work, not concentrating on his duty as the security guard and church property being stolen while on duty. The parties herein by consent dispensed with the oral hearing and proceed to files submissions.

7. Mr Otieno for the claimant briefly submitted that the respondent avoided to adduce on record the grievant's record of employment to

challenge the evidence in the statement of the claim. Further that there was no evidence on record produced by the respondent to prove that Father Frank Wright paid the grievant all monies and allowances due to him from April, 1996 to July, 2009. Mr Otieno further submitted that whereas the respondent accepted to pay the grievant equivalent of 15 days work for every year worked but subject to his contract not being terminated the respondent never stated the nature or kind of termination.

8. Mr Mathenge for the respondent submitted that there was no denial by the claimant in regard to his having been informed and warned verbally on several occasions on his conduct and or misconduct. Counsel further submitted that section 35 (1) (c) of the Employment Act provides that where the contract is to pay the salary monthly, a notice in writing for termination of employment should be given. However, section 36 envisages a situation where the notice may be waived. Upon payment to the other party of the remuneration which would have been earned by that other party in respect of the notice period.

9. Concerning payment of terminal benefits for the period worked before he entered into the written contract, counsel submitted that the claim had no footing as all benefits due were paid before signing the new contract. Further minutes of the Parish Pastoral and Planning Council held on 31st and at page 75 of the respondent's bundle documents at minute 4/02/09 it is clearly stated by Mrs Clementina Ochieng that Father Frank had paid all the workers including the claimant their terminal dues at the time of leaving the Parish.

10.Concerning the claim for overtime for a period of 15 years, counsel submitted this could not be humanely possible. The claimant was contracted to work for 12 hours a day from 6 a.m. to 6 p.m. with one day off each week. Mr Mathenge further submitted that the claims for the period prior to 2009 were statute barred and further could not be brought under the Employment Act, 2007 since there was no provision in the Act for retrospective application.

11.The claimant herein, according to the termination letter dated 28th March, 2011 was terminated on grounds among others that he left his place of work without permission, he was irresponsible and lacked interest at work and above all things had been stolen twice while he was on duty. At the Parish Council Members Meeting of 16th April, 2011 the minutes of which are found at page 77 of the respondent's bundle, the issues that led to the grievants dismissal were discussed. The meeting concluded that the grievant be grilled further as he was involved in loss and insecurity at the church premises. There is no evidence that the grievant was subsequently grilled or called upon to react to the accusations leveled against him. There's further no evidence of any disciplinary hearing as required by the Employment Act.

12. The onus of proof of reasons for dismissal or termination of employment lies with the employer. It may well be that the accusations against the grievant were true but there was no evidence that he was confronted with these accusations to enable him defend himself before the termination of his service the court therefore inevitably reaches the conclusion that the termination of the claimants service was unfair in terms of procedure followed in carrying it out.

13. Concerning the claim for terminal benefits prior to 2009, the claimant herein was issued with a written 2 year contract on 1st August, 2009. This effectively terminated his previous oral contract. The previous verbal contract was governed by the former Employment Act (cap 226) and where Unions are concerned the Trade Disputes Act. The applicable law of limitation was Limitation of Actions Act which placed a limit of six years on any action based on contract. There was no provision for continuing injury as in the current Act. This claim was filed on 23rd March 2015 therefore the only claim which the court can validly claim would date six years back to 2009.

14. The respondent admitted that the claimant used to work from 6 pm to 6 a.m. That is a total of 12 hours a day. Under the Regulation of Wages (General) Order the general working hours are set at 52 hours a week. However, normal working hours usually consist of 45 hours per week, Monday to Friday 8 hours each and 5 hours on Saturday under special order for different sectors.

15. From the respondent's own admission therefore the grievant was working an extra four hours a day and for which there was no evidence that he was paid overtime. Concerning service pay the respondent also admitted that the grievant was entitled to 15 days pay for each complete year of service but on condition that his services were not terminated. The court having impugned the termination the claimant becomes entitled to service pay.

16. Overtime rate is by practice 1 ½ daily wage per extra hour worked. The claimant worked for extra hours per day which translates to 24 hours a week or 1,248 hours a year. The number of years claimable backwards as already stated is six years upto 2009. Therefore the claimant would be entitle to claim 7,488 hours of over time for the six year period.

17. In conclusion the court awards the claimant as follows:

a. Overtime upto 2009 @1 ½ daily wage

per hour (7,480x 375) 2,805,000

b. Service pay at the rate of 15 days wage

for each complete year of service 22,500

c. Seven months salary as compensation for unfair

Termination of services 52,500

2,880,000

d. Costs of the suit.

18. Items (a), (b) and (c) shall be subject to taxes and statutory deductions.

19. It is so ordered.

Dated at Nairobi on this 23rd day of February 2018

Abuodha J. N.

Judge

Delivered at Nairobi on this 23rd day of February 2018

Abuodha J. N.

Judge

In the presence of:-

……...…… for the Claimant

……..…….. for the Respondent