



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 340 OF 2017

AGNES PIRI MWATATACLAIMANT

VERSUS

METHODIST CHURCH IN KENYA TRUSTEES REGISTERED

THE PRESIDING BISHOP MCK CONFERENCE OFFICE NAIROBI

THE BISHOP MOMBASA SYNOD

THE STANDING COMMITTEE MOMBASA SYNOD.....RESPONDENTS

JUDGMENT

Introduction

1. The claimant brought this suit on 3.5.2017 alleging unfair Labour practice for an improper transfer from her employment and giving her a new job without consulting her and against her wish. She further alleged that the respondents were contemplating to take her through unfair disciplinary process. She therefore prayed for the following reliefs;

- (a) Payment of her dues up to date.
- (b) A declaration that the action of the Presiding Bishop to redesignate the Claimant in a new job that she had not applied for is unfair and an overstep of his mandate.
- (c) A declaration that the Claimant is entitled to continue serving in her current position and contract in the Mombasa Synod as per her job description and terms of employment.
- (d) Damages for unfair labour practices contrary to article 41 of the constitution.
- (e) Costs of this suit.

2. The respondent have denied the alleged unfair labour practice and unfair disciplinary process. It is the defence case that the claimant was at all material time employee of the Conference of the Methodist Church of Kenya (MCK) and the presiding Bishop of the MCK had the power to transfer her from MCK Mombasa Synod to his office in Nairobi. It is further defence case that the claimant refused to go on a transfer as instructed by the presiding Bishop MCK and as such, the respondents have every right to take disciplinary action against her. They therefore prayed to have the suit dismissed with costs.

3. Simultaneously with the suit, the claimant filed an application for conservatory orders which were agreed upon by the two sides on 4.5.2017. The suit was heard on 5.6.2017, 6.6.2017 and 15.6.2017 when the claimant testified as Cw1 and called 2 witnesses while the respondents called 3 witnesses. Thereafter the both parties filed written submissions.

Claimant's case

4. Cw1 testified that she was employed by Pwani Synod (now Msa Synod) of MCK on 31.12.1991 as the Bishop's Copy Typist/Clerk. Her salary was Kshs.1,650 gross which was increased to Kshs.51,945. She worked well and continuously at Mombasa until 10.2.2017 when she received the letter dated 20.1.2017 from the Presiding Bishop MCK purporting to transfer her to MCK Conference office in Nairobi to serve

in a new position of Receptionist/Office Assistant effective 15.2.2017.

5. Cw1 contended that the said transfer was irregular and unsolicited for and the terms and conditions of service were not communicated. She therefore maintained that the transfer from her Mombasa Synod to the MCK Head Office meant that her employment contract at the Mombasa Synod was being terminated unprocedurally and that she was being given a new employment contract which she never applied for.

6. Cw1 further contended that after receiving the transfer letter, she wrote appeal and went to see the Presiding Bishop and registered her disinterest in taking up the new appointment at the MCK Conference Office Nairobi citing several reasons one of them being her family. According to her, the Bishop gave her the chance to consult with her family and report to him the decision.

7. When she went back to Mombasa she fell sick and before long she was invited to disciplinary hearing for the offence of declining transfer to Nairobi. She maintained that she was employed by the MCK Mombasa Synod, which paid her salary NSSF, and pension. She denied being employed by the MCK Conference office and prayed for reliefs sought in her statement of claim.

8. On cross examination Cw1 admitted that Mombasa Synod is under MCK. She further admitted that the offer letter dated 28.12.1991 provided at paragraph 2 that the terms and condition of service for lay workers of the MCK were to apply to her. She also admitted that Mombasa Synod is not autonomous. She however contended that the Synods and the Conference office advertise and recruit their staff independent of the other. Cw1 admitted that the Presiding Bishop has administrative powers over church officers and institutions officers, elected or appointed. She clarified that the transfer letter never directed her to report to the HR Department.

9. Tsuma Munga Chidongo testified as Cw2. He stated that a Synod cannot be established unless there is prove that it can meet its expenses. He contended that a Synod employs its employees including a competent Accounts Assistant. He further contended that each Synod has its own standing committee that evaluates every need. In his view, the presiding Bishop has administrative powers over the church officers who are employed by the MCK Conference whether at the Conference office or stationed at the Synods like the Health and Education Institutions. He stated that it was wrong for the Presiding Bishop to transfer the claimant without consulting the Synod standing committee because it is the Synod that pays its own employees.

10. On cross examination Cw2 stated that he worked for 3 different Synod for 15 years starting as Church Minister, Superintended Minister and as Secretary for Synod and as such he was conversant with the operations and procedures of the MCK. He admitted that the Presiding Bishop is Chief Executive Officer (CEO) of the MCK and he can do administrative functions at the Synods with consultations with the Synod Bishop who is the Synod Administrator.

11. Cw2 admitted that the 2015 Standing Orders of the MCK are the operational ones but denied that the claimant was a church officer under standing order number 1(n) of 2015. He concluded by stating that the only officer of the Church in the Synod is the Accountant under Standing Order 47 and maintained that Synod Bishop's Secretary is not Church officer like the conference employees.

12. Mr. Reuben Chilebi testified as Cw1. He testified that he once served as the Treasurer Pwani Synod now Mombasa Synod. He stated that the Presiding Bishop is not signatory to the Synod Bank Accounts. He concluded by admitting that the Presiding Bishop can transfer ordained Ministers.

Defence Case

13. Bishop Michael Benjamin Simba testified as Rw1. He is the Bishop Mombasa a Synod and the Chairman of the NCKK Coast Region. He supervises workers in the circuits (parishes) in consultation with the Presiding Bishop. He testified that he cannot hire, fire or transfer employees in the Synod without consulting the Presiding Bishop. He further stated that the Synod has no HR Department and explained that it is situated at the Conference Office (Head Office). He contended that the Presiding Bishop as the CEO of MCK, he can transfer employees from the Synod to the conference and the vice versa under standing order 33(n) of 2015 without consultations. He confirmed that after the transfer of the claimant by the Presiding Bishop, he wrote a release letter immediately.

14. Rw1 explained that the Presiding Bishop is a signatory of all Synod Bank Accounts and as such he exercises control over them. He contended that the synods cannot pay out any money without the authority from the Presiding Bishop, which is done during the annual Conference.

15. On cross examination, Rw1 admitted that his Synod has a standing committee but denied that it can employ without consulting the Presiding Bishop. He contradicted paragraph 8 of the defence by confirming that Mombasa Synod has its own income to pay its workers but he maintained that is done in consultation with the Presiding Bishop as per the HR manual. He confirmed that the claimant was recruited by the standing committee of Pwani Synod. On further cross examination, Rw1 stated that the transfer of claimant was also a promotion with a new salary package. He however confirmed that the new salary was not stated in the transfer letter. He concluded by stating that the Synod standing committee recruits and pays salary to the Synod employees on behalf of the Conference.

16. Timothy Multan Mutirithia testified as Rw2. He is the HR Manager and Internal Auditor for the MCK Conference. He admitted that he learned from the pleading herein that the claimant was working in the MCK Mombasa Synod. He explained that MCK has HR Department and the Presiding Bishop is the final authority in employment, promotion and transfer of employees of the MCK under the standing orders and the HR Policy Manual. He further explained that the Standing Orders are passed periodically and the one applicable to this case were passed in 2015.

17. Rw2 stated that the claimant was transferred by the Presiding Bishop under the said Standing Orders and HR Policy Manual and that decision was from the final authority. He maintained that the transfer was in order under the HR Manual number 013 of 18.12.2009. He further explained that the letter of transfer by the presiding Bishop was fair because it asked the claimant whether she required any leave to prepare for the transfer but she declined the transfer. He concluded by stating that refusing the transfer amounted to gross misconduct under

HR Manual number 046 of 18.12.2009 and it falls under unauthorized absenteeism which attracts summary dismissal.

18. On Cross examination, Rw2 denied that the letter dated 20.1.2017 was a new appointment for the claimant and maintained that it was a mere transfer to serve in a new position. He observed that the letter never stated that she was being promoted and it never offered any new pay package. He maintained that the claimant was to continue her service in the new position because she was MCK employee stationed at the Mombasa Synod.

19. He denied that a Synod was independent from the MCK and contended that Presiding Bishop is the Chairman of all the Synods in Kenya, where he is represented by the Synod Bishops. He explained the MCK is episcopal which means centralized governance and the Synod Bishops only exercises delegated powers. He further contended that the Presiding Bishop was controlling the working of the claimant through the Synod Bishop. He concluded by stating that the Presiding Bishop transferred the claimant after consultation with the Mombasa Synod Bishop.

20. John Matole Mwera testified as Rw3. He testified that the conference is the Supreme organ of the MCK and all what is done at the Synods has to be sanctioned by the Presiding Bishop. He further stated that a Synod Bishop has a no power to employ or transfer worker without permission from the Presiding Bishop. He confirmed that the claimant was the Clerk to the Bishop Mombasa Synod for over 15 years but contended that she was employed by the MCK Conference. He therefore saw no malice in the transfer of the claimant to the MCK Conference from the Synod.

21. On cross examination, Rw3 admitted that Mombasa Synod has its own Income running into millions of shillings which in consultation with the Presiding Bishop is used to pay salaries to its workers and allowances to the Synod Bishop.

Analysis and Determination

22. There is no dispute that the claimant was recruited in 1991 to work as the Copy Typist/Clerk to the Bishop Pwani Synod by standing committee of the said Synod. There is also no dispute that she has ever since worked at the said station and all her salary, NSSF and pension is paid by the said Synod which has since changed name to Mombasa Synod. There is also no dispute that by the letter dated 20.1.2017, the Presiding Bishop MCK transferred the claimant from the Mombasa Synod to the MCK conference office to serve in a new position but she appealed against it.

23. The issues for determination herein are:

- (a) Whether the claimant was employed by Mombasa Synod or MCK Conference.
- (b) Whether the claimant was transferrable from Mombasa Synod to the Conference office without first consulting her and obtaining her consent.
- (c) Whether the Presiding Bishop can lawfully discipline the claimant for declining the transfer.
- (d) Whether the reliefs sought by the claimant should issue.

Claimants Employer

24. The claimant's case is that she was employed by the Pwani Synod in 1991 which later became Mombasa Synod. She denied any contractual relationship between herself and the MCK Conference (Head Office) and contended that it is the Synod which paid all her salary, NSSF and Provident Fund Contributions. The defence has on the other hand contended that the Synod has no power to hire her own employee. According to the defence, the Synod recruits and pays employees on behalf of the MCK Conference (Head Office).

25. I have carefully considered the evidence and the submissions by parties. It is clear that the operations of MCK are governed by standing orders which are passed periodically. The standing orders enforce as at 1991 when the claimant was recruited by the Pwani Synod was the 1988 version. Standing order No. 53 of 1988 provided that;

“No Circuit, society or institution within a Circuit should employ a lay worker whether permanently or on contract unless permission is granted by the Conference through the Synod Bishop. Where such a permission is granted and a circuit or society within a circuit employs a lay worker who is not directly appointed by the conference, the circuit stewards shall make clear to him/her that he/she is employed upon a circuit or society basis and that the Conference will undertake no financial responsibility for him.”

26. The foregoing standing order is clear that MCK had in mind two categories of employees. The first cadre of employees are those employed at the Synod level for Synod purposes with the permission of the Conference. Such employees were to get clear explanation from the start that they belonged to the Synod, circuits, societies or institutions and the Conference was not responsible for their financial benefits. The second category of employees were those directly appointed by the conference to work for the MCK Conference at the Conference offices or at the Synod level. Such employees were squarely under the conference for all their financial benefits.

27. In this case the Pwani Synod advertised for the position of Bishop's Copy Typist and interviews were conducted in which the claimant emerged top and she was appointed according to the minutes dated 22.12.1991 and confirmed on 4.1.1992. By the letter dated 28.12.1991, the Synod Bishop offered the claimant the post of Bishop's Copy Typist/Clerk at the Synod office which she accepted in writing on 31.12.1991. Thereafter, the Synod Bishop gave her the Appointment letter dated 1.11.1992 stating in part that;

“LETTER OF APPOINTMENT

Dear Sir/Madam Miss AGNES PIRI MWATATA

This letter confirms your appointment as an employee of METHODIST CHURCH IN KENYA, PWANI SYNOD on the following terms and conditions of service”

28. Considering the Standing order no. 53 of 1988, and the minutes, the offer letter and appointment letter cited herein above, I find on a balance of probability that the claimant was not a conference employee but the employee of Pwani Synod which later became Mombasa Synod of the MCK. She was paid and supervised by said Synod and not the conference. Rw2, the conference HR Manager admitted that he only came to know about the claimant from the pleadings filed in this suit.

Under section 2 of the Employment Act, as employee and employer is defined as follows:

“employee means a person employed for wages or a salary and includes an apprentice and indentured learner;”

“employer means any person, public body, firm, cooperation or company who or which has entered into a contract of service to employee an individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”.

29. Having found that it is only the MCK Mombasa Synod that had a written contract of service with the claimant, I proceed to hold that the claimant’s employer was the MCK Mombasa Synod and not the MCK Conference. The foregoing holding is fortified by the Organogram for MCK in the chart drawn under HRM Policy No. 010 of 2009 and the schedule of job titles outlined under HRM Policy No. 014 of 2009 which clearly shows that the Synod administration is parallel to the Conference office and they operate independently.

Transferability to the Conference

30. The claimant’s case is that the purported transfer from his work station at the MCK Mombasa Synod to a the MCK Conference on a new position improper and unfair. It is her contention that the said transfer amounts to a termination of his employment contract with the Synod in favour of a new job at the Conference without her consent. However the defence has maintained that the claimant was at all material times a conference employee and as such the presiding Bishop who alone has the mandate to transfer workers, was right in transferring the claimant from Mombasa Synod to the Conference office at Nairobi.

31. After careful consideration of the material presented to me, I find on a balance of probability that the Presiding Bishop was wrong in purporting to transfer the claimant from her employment in Mombasa Synod to the Conference to serve under new position without her consent. The purported transfer of the claimant was without any doubt equal to terminating her contract of service with the Mombasa Synod and giving her a new employment without prior consultation and against her wish. It was therefore a breach of the said contract of employment for the Synod Bishop to write a letter releasing the claimant to proceed on the said transfer to the conference without consulting her.

32. Having found herein above that under the organogram in HRM Policy No. 010 of 2009 the claimant was not and could not be described as an MCK Conference office employee, and without any evidence from the defence to prove that she was subject to a normal transfer from the Synod to the Conference office, I now hold that the claimant was not transferable from the Synod to the Conference office without prior consultation. With due respect to the Presiding Bishop, I find that he exercised his discretion as the CEO of MCK wrongfully without respecting the contract of employment between the Synod and the claimant. If at all he noticed certain qualities of good service in the claimant and desired to have her in his office, he ought to have consulted with both the claimant and her employer and made it clear her terms of service in the new job and the fate of her terminal benefits from the Synod employment.

Disciplinary action for declining transfer

33. In view of the finding herein above that the claimant was employee of the Mombasa Synod and that she was not be transferable to the Conference office without prior consultation and her consent, I again find that the disciplinary process initiated by the Presiding Bishop MCK is irregular, unlawful and unfair. As the CEO of the MCK, he is bound by the contracts entered into between the Synod with the permission of his predecessors. He has also not produced any evidence which gives him the power to punish employees of the Synods who he wants to serve at his office without first discussing the terms upon which to transit from the Synod employment to the Conference employment.

Relief

34. Having found that the claimant was employed by Mombasa Synod, that she was not transferable to the Conference office, and that the Presiding Bishop has no authority to punish her for declining the purported transfer, I make declaration that, the purported transfer of the claimant from Mombasa Synod to a new job at the Conference Office in Nairobi is unfair and an overstep of his mandate. I further make declaration that the claimant is entitled to continue serving in her current position and contract in the Mombasa synod as per her job description and terms of employment. She is therefore directed to report to the MCK Mombasa Synod Bishop’s office to resume work within 7 days from the date of delivery of this judgment.

35. I further direct that she be paid all her salary by Mombasa Synod because she was barred from attending her work by the Synod Bishop’s letter dated 13.2.2017. The said salary to be calculated and paid to the claimant within 21 days from the date of delivery of this Judgment.

36. Finally I award the claimant Kshs.200,000 being damages for disturbance and mental torture through the unfair labour practice by the respondents contrary to Article 41 of the Constitution of Kenya. There is no denial that the claimant has had to travel to Nairobi severally to see the Presiding Bishop to appeal against the decision to transfer her unlawfully and without clear terms of service. It has also not be denied that during such visits, the claimant was kept waiting at the office till late hours and at times she was forced to spend the night in Nairobi after she failed to see the Presiding Bishop in time. Such suffering was unwarranted and the respondents are held liable to pay the said damages to the claimant.

Disposition

37. For the reason stated above I enter judgment for the claimant in terms of the declarations and directions made herein above, and awarding Kshs.200,000 damages for being subject to unfair labour practices by the respondent contrary to Article 41 of the Constitution. The claimant will also have cost plus interest.

Signed and dated and at Nairobi this 6th day of April, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of April, 2018.

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JUDGE