



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 277 OF 2016

(consolidated with 276 of 2016)

BENSON NYAMAWI JAMES

OTIENO OWUONDA.....CLAIMANTS

VERSUS

THE REGISTERED TRUSTEES OF

THE CATHOLIC DIOCESE OF MOMBASA.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants brought this Suit on 4.4.2016 claiming terminal dues plus compensation for unfair termination of their contract of service by the Respondent on 14.9.2015. In total the Claimant seeks to recover Kshs.441,506.50 and Kshs.909,973.80 respectively, General damages, Certificate of Service, Costs and interest. The Respondent has however denied the alleged unfair termination of the Claimant's contract of service and averred that the termination was done after strict compliance with the law and therefore prayed for the suit to be dismissed with costs.

2. The suit came up for hearing on 15.12.2016, 15.5.2017 and 5.6.2017 when the Claimants testified as Cw1 and Cw2 respectively while the Respondent called Father David Otiemo as Rw1. Thereafter both parties filed written submissions which I have carefully considered herein.

Claimants' Case

3. Cw1 stated that he was employed by the Respondent as a teacher at St. Mary's Junior Seminary at Kwale on 4.1.2011 under a fixed term contract of one year. The contract was renewed in January 2012 and 2013 but in January 2014 the contract was renewed for two years. During the last his salary was Kshs.26,008 per month. On 14.9.2015, Rw1 called to the office where he found Cw2 and 2 other teachers. Rw1 told them that their services were to be terminated because they were not Catholics but reason could not be stated in writing. He then gave each teacher a letter dated 14.9.2015 communicating 3 months termination notice effective 15.12.2015 "due to unavoidable circumstances." They served through the notice period but they were not paid their salary for December 2015.

4. Cw1 contended that the termination was unfair for want of just reason. He maintained that although the termination notice cited the reason for the termination be unavoidable circumstances, Rw1 told them verbally that they reason was because they were not Catholics. He therefore prayed for three month salary in lieu of notice, compensation for unfair termination, unpaid salary for December 2015, severance pay, accrued leave, certificate of service plus costs.

5. On cross examination he admitted that his contract was to end in December but the date was not specified. He further denied that school holidays were equivalent to the annual leave provided in his employment contract. He maintained that he was entitled to terminal dues for the three contracts served. He denied that he was a poor performer and maintained that the termination notice never cited that as the reason for termination.

He however admitted that he was a trained teacher and he did not have a TSC number.

6. Cw2 was also employed by the Respondent as a teacher starting 2.6.2009. He served under one year contract but the last contract was for 2 years starting from June 2014 and his salary was Kshs.20,774 per month. He was a trained teacher holding Bachelors degree of Education. On 14.9.2015 he was called by Rw1 to the office with 3 other teachers including Cw1 and the Rw1 told them that he was going to terminate their services because they were not catholic. He confessed that he could put that reason into writing and proceeded to serve them with termination letters dated the same date and citing the reason as unavoidable circumstances. The notice was for 3 months upto 15.12.2015.

7. He contended that the termination was unfair because it was based on discrimination on ground of religion. He denied that he was a poor performer and maintained that he had received commendation for his good performance. He therefore prayed for three month salary in lieu of notice, compensation for unfair termination, unpaid salary for December 2015, severance pay, accrued leave, certificate of service plus costs. He contended that he never went for any annual leave throughout his service.

Defence Case

8. Rw1 stated that he is a priest and also the Principal St. Mary's Seminary Kwale. He confirmed that the Claimants were employed as teachers in his school on contract basis. Their last contracts were for two years lapsing in December 2015 and June 2016 respectively. He stated that each of the Claimant's contract provided for termination by 3 months' notice period.

9. On 15.9.2015 he served the with 3 months termination notice as provided under the contract and they served through the notice period which was ending on 15.12.2015. He contended that the reason for the termination was poor performance. He also explained that the Bishop had recommended for Catholic teachers who could journey with the students spiritually because they were all Catholics.

10. Rw1 further stated that the Claimants were going for their annual leave during April August and December school holidays. He contended that all the terminal due owing, including salary for December 2015, were paid to the Claimants during the pendency of this case by the cheques dated 22.5.2017. He concluded by stating that there was no agreement binding the Respondent to new the Claimants' contracts.

11. On cross examination he denied that the termination was faith based. He denied ever indicating any reason for the termination to the Claimants. He maintained that he only gave them the letters giving them 3 months termination notice. He further maintained that the claimants went for their annual leave during all the 3 school holidays and they were paid their salary in full. He explained that the delay in paying the terminal dues was because he was waiting for the board to meet after the Claimants' advocate demanded more items.

Analysis and Determination

12. There is no dispute that the Claimants were employed by the Respondent as Teachers on fixed term contracts until they were terminated on 15.12.2015. The issues for determination herein are:-

a) Whether the Claimants' contract of service was unfairly terminated.

b) Whether the Claimants are entitled to the reliefs sought.

Unfair Termination

13. The burden of proving unfair termination is placed by section 47(5) of the Employment Act on the employee who alleges that he was so terminated. Thereafter the burden shifts to the employer to prove and justify the reason for the termination and the fairness of the procedure followed before the termination. In this case, the Respondent has admitted that she terminated the Claimants by serving 3 months' notice because of their poor performance.

14. However, the Claimants have denied the alleged poor performance and contended that they were terminated because they were not Catholics. They were unanimous that when Rw1 called them to the office he told them that they were going to be terminated because they were not Catholics a reason which could not be communicated in writing. The allegation by the Claimants was corroborated by Rw1 when he admitted on oath that "the Bishop had recommended for the catholic teachers who could journey with the students spiritually." In addition to the foregoing, the termination notice dated 14.9.2015 further corroborated the Claimants' evidence by stating that the termination was due to unavoidable circumstances.

15. After careful consideration of the evidence and the submissions presented by the parties, I find on a balance of probability that the services of the Claimants were unfairly terminated by the Respondent. Under section 45(2) of the Act, termination of employment is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case the reason for the termination was not the Claimants' poor performance as alleged by Rw1 because if that was reason, the same would have been stated in the termination letter or pleaded in the defence.

16. I agree with the Claimants that the reason for their was because they were not Catholics which Rw1 told the Claimants that he could not put in writing and stated in the letter as unavoidable circumstances. Section 46 of the Act provides that the following do not constitute fair reasons for terminating employment contract of an employee:

"(g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status. HIV status or disability;"

Reliefs

17. In view of the finding herein above that the Claimants were unfairly terminated, I award the second claimant 5 months' salary as months compensation for the unfair termination of his contract service under section 49 of the Act. In granting the said compensation I have considered the remaining period of his contract term and also the fact that the he did not contribute to the termination through misconduct. I however declined to award any compensation to the first claimant because his fixed term contract was ending in December 2015 when the termination took effect.

18. The claim for terminal dues including salary for December 2015 was paid during the pendency of the suit while the claim for salary in lieu of notice was withdrawn and as such those prayers are spent. In addition, the claim for severance pay is dismissed because the termination was not through redundancy. In any event, the Claimants' were adequately compensated by service gratuity at the rates stipulated under their respective contracts of employment. The claim for accrued leave is also dismissed because the Claimants went for school holidays 3 times in a year with full pay.

Disposition

19. For the reasons that the termination of the Claimants' services was unfair, I enter judgment for the second Claimant in the sum of Kshs.103,870. However, both Claimants are awarded costs plus interest.

Dated and signed at Nairobi this 16th day of March, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 12th day of April, 2018

LINNET NDOLO

JUDGE