



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 16 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ISAYA KISIVULI AMBUGU.....CLAIMANT

VERSUS

THE GENERAL SECRETARY

FREE PENTECOSTAL FELLOWSHIP IN KENYA T/A

BUKHUNGU YOUTH POLYTECHNIC.....RESPONDENT

JUDGEMENT

Vide a plaint dated 14th January and filed on 10th February 2014, the plaintiff ISAYA KISIVULI AMBUGU avers that he was unfairly terminated by the respondent on 12th April 2012 after working for 27 years. He prays for the following remedies –

- (a) General damages for wrongful dismissal.
- (b) Compensation for years worked and leave allowance for years worked.
- (c) Costs and interest
- (d) Any other relief

The respondent filed a statement of defence denying the contents thereof.

At the hearing of the case, the claimant testified on his behalf while the respondent called one witness WALTER ANG' IENDA OGONE, a Pastor and Registered Trustee of the respondent who testified on its behalf.

Claimant's Case

The claimant testified that he was employed by the respondent in 1984 and first worked at the construction site for Bukhungu Polytechnic before he was moved to become a workshop attendant. On 19th November 2003, he received a letter from the respondent asking him to proceed on compulsory leave.

The claimant testified that he resumed duty and worked until 12th April 2012 when he was dismissed by Mr. Babu, the Chairman of the respondent from Head Office. He was not issued with a letter of dismissal and was not paid any benefits after working for 27 years.

The claimant testified that he was paid salary of Kshs.4,000 per month. He was later deployed as a security guard and worked as both day and night guard.

Under cross-examination, the claimant testified that he was employed by the church. He testified that he was aware the polytechnic was run by the church, as he was present all through its existence. He testified that he had filed documents to prove his case.

The claimant testified that officials from head office terminated his employment and promised that he would be paid terminal dues but he

had not been paid. He testified that his salary was paid through vouchers.

Asked whom he had sued, the claimant responded that he had sued the General Secretary because he is the head of the church at the head office. He testified that he had sent a demand letter to the head office but did not file a copy in court.

Respondent's Case

WALTER ANGIENDA OGONE testified that the respondent was a society and should be sued through its trustees. He testified that he did not know the claimant but responded to the summons because the claimant had sued Free Pentecostal Church.

Rev. Ogone testified that all employees of the respondent are issued with letters of appointment by the head office in Nairobi and are terminated on grounds of gross misconduct when proved guilty and after three warnings. He testified that the claimant was not a watchman because all the respondent's watchmen have letters. He further testified that Bukhungu Polytechnic is not owned by the trustees. He testified that the General Secretary does not run Bukhungu Polytechnic and that the claimant had sued the wrong person as he should have sued the trustees.

When given an opportunity to cross-examine the witness, the claimant who is almost illiterate instead started making a statement. Upon being asked for clarification by the court, Rev. Ogone testified that he knew Bukhungu Youth Polytechnic but it was not run by the respondent. He testified that Julius Bagaka was a General Secretary of the respondent but left 12 years ago. He testified that Bukhungu Youth Polytechnic was still in operation but he did not know who was currently managing it.

Determination

I have carefully considered the pleadings and evidence on record. The issues for determination are in my opinion the following –

- (i) Whether the respondent was the employer of the claimant
- (ii) Whether the respondent has been wrongfully sued.
- (iii) Whether the claimant was unfairly terminated by the respondent
- (iv) Whether the claimant is entitled to the remedies sought.

Whether respondent was the employer of claimant

The claimant testified that he was employed by the respondent who was operating Bukhungu Youth Polytechnic. To prove this he produced a letter of reference dated 15th November 1992 from the Principal of Bukhungu Youth Polytechnic, a copy of NSSF provisional member statement of account, a letter from the respondent sending him on compulsory leave signed by Rev. Julius Bagaka, General Secretary dated 19th November, 2003 and a wages claim from the County Labour Office addressed to the respondent.

The letter of reference reads as follows –

“Free Pentecostal Fellowship in Kenya

Head Office

P.O. Box 474 69 GPO Nairobi

Kenya

Tel. +254 (020) 57 01 26, 574595/6

Email: hoffice@fpfk.or.ke

www.fpfk.or.ke

Wednesday, 19th November 2003

TO: Mr. Isaiah Ambugu

P.O. Box 1671

KAKAMEGA

Dear Isaiah

RE: COMPULSORY LEAVE

This is to Notify you that the Bukhungu youth polytechnic is currently undergoing a restructuring. During this period, no much work is going on as per your duties.

It is in this respect we have decided to give you a compulsory leave as from 19th November 2003 until we advise you accordingly.

We hope you will understand and bear with the situation.

Yours Faithfully

Signed

Rev. Julius Bagaka

GENERAL SECRETARY”

The statement from NSSF is further proof of the fact that the claimant was employed by the respondent with contributions reflected from the year 1995 to September 2002.

Rev. Ogone, the respondent’s witness confirmed that Rev. Julius Bagaka who wrote the letter sending the claimant on compulsory leave on 19th November 2003 was the General Secretary of the respondent as reflected in the letter produced by the claimant.

The documents produced by the claimant, which were, not contested by the respondent, corroborate the testimony of the claimant and prove that he was employed by the respondent.

The testimony by Rev. Ogone that he does not know the claimant or that all its employees have letters of appointment do not controvert the evidence contained in the documents produced by the claimant. In any event, his testimony cannot override the evidence in the documents produced by the claimant. The contention in the submissions of the respondent that Bukhungu Polytechnic was run by Swedish Mission Council is not supported by any evidence or pleadings and was only made in the submissions.

I am therefore satisfied from the evidence on record that the claimant was an employee of the respondent –

Whether the respondent has been wrongfully sued

The respondent has submitted that it has been wrongfully sued as the claimant should have sued it through its trustees. In support of that contention the respondent relied on the case of **Kazungu Kalama and Another -vs- Victor Okoth Waudi Cause No. 446 of 2015** consolidated with **Cause no. 468 of 2015** in which the court stated –

“... on a balance of probability, I agree with the evidence by the defence that the respondent never employed the claimants but they remained employees of the estate of the deceased’s father. That without any evidence that the respondent was a manager or agent of deceased’s business, I am of the view that the respondent does not fit within the description of an employer under Section 2 of the Employment Act...”

The respondent further relied on the case of **Grace Mwenda Munjuri -vs- Trustees of the Agricultural Society of Kenya, Cause No. 1317 of 2010**, in which the court referring to the case of **Voi Jua Kali Association -vs- Sange and Another (2003) 2 KLR 474** stated

“the law on suits by or against societies is well settled:

“A society not being a legal person cannot sue or be sued by its name. It has to sue or be sued through its officials, officials have to be named. Titles like Chairman, Secretary and or Treasurer cannot be used as those are not legal persons either. In this case where there are Trustees of the respondent society these Trustees are known persons against whom orders may be executed.....”

It is the opinion of this court that this legal position is no longer applicable following the promulgation of the Constitution 2010, which at Article 159 (2) requires courts to administer justice without undue regard to procedural technicalities. Sections 3 and 20 (1) of the Employment and Labour Relations Court Act further require this court to apply substantive justice.

The Employment Act defines employer to mean **“any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;”**

Thus a firm, which is not necessarily a legal person, and an agent, foreman, Manager or factor, are all recognised as “an employer” and an employee who has been employed by an employer is allowed to sue in the name of the employer as reflected in the contract of employment, to sue such employer. Since the law recognises both written and oral or implied contracts, an employee cannot be locked out of the court

system because he has sued the person he worked for in the only name he knows. An employee cannot lose his rights simply because he or she has described the employer as known to him in a manner that is not reorganised under the Law of Persons.

An employment relationship is a question of fact and not of law and once the court finds that an employment relationship exists between an employer and an employee, the manner in which the employer is described in the proceedings cannot be used to deny the employee his employment rights or benefits.

It is the opinion of this court that an employee is allowed to sue his employer in the name by which the employer is described or known in the contract of employment especially in cases where the employee is unrepresented and semi-literate as in the present case. Otherwise, the court stands to be accused of discrimination on grounds of economic or social status. Article 27 (1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

Having established that an employment relationship existed between the claimant and the respondent, the claimant cannot be denied audience by the court merely because he has not sued the respondent through its trustees.

I find that the claimant's suit as filed is valid and not fatally defective for not having sued the respondent through its trustees and that no prejudice has been occasioned to the respondent by the manner in which it has been named in the suit.

Whether the claimant's termination was unfair

The claimant testified that he was terminated verbally by Mr. Babu from head office on 12th April 2012 without notice and without payment of terminal benefits.

Under Section 41 of the Employment Act, an employer must give an employee the reason(s) for termination of employment and the employee must be given an opportunity to be heard before the termination is effected. This was not done in the case of the claimant.

Although Rev. Ogone denied knowledge of the claimant, he did into deny that Mr. Babu worked for the respondent. I have confirmed from the documents filed by the respondent that REV. SILAS BABU MUNYI is/was its trustee as reflected on the registration dated 17th October 1990. The said Rev. Babu was not called to give evidence to controvert the averments of the claimant nor was it stated that he was unavailable.

Section 43 further provides that there must be valid reason for termination of employment. The claimant was not given any reason for the termination of employment.

The termination of the claimant's employment thus fell short of both substantive and procedural requirements of the Employment Act and the termination is therefore unfair in accordance with Section 45 (2) of the Act. I thus find and declare the termination of employment of the claimant by the respondent unfair.

Remedies

The claimant prayed for general damages for wrongfully dismissal. Under the Employment Act, damages are awarded in the form of compensation, which the clamant has also prayed for in his prayer number (6). Having worked for 27 years and taking into account all circumstances of the case as well as the factors set out in Section 49 (4) of the Act, I award the claiming maximum compensation of 12 months' salary.

According to the Regulation of Wages (General Order) 2010 which was applicable in April 2012, when the claimant's employment was terminated, the basic salary for a night watchman under municipalities was Kshs.6,974. In compliance with Section 26 of the Employment Act and Section 48 (1) of the Labour Institutions Act, I will apply the minimum consolidated wage for purposes of assessing the compensation payable to the claimant. The two sections provide as follows –

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation

order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

The consolidated wage is the basic minimum wage increased by 15% for house allowance as provided under the Regulation of Wage (General) Order.

The compensation payable to the claimant is therefore $(6,974 + 15\%) \times 12$ being Kshs.96,241.20/= which I award the claimant on account of compensation. He is also entitled to notice at the consolidated salary of Kshs.8,020.10.

The claimant further prayed for leave allowance for days worked. He cannot be paid leave of 27 years. In compliance with Section 90 of the Employment Act, which sets the limitation period at 3 years, I award the claimant leave for 3 years at 21 days per year being 63 days at Kshs.16,842.20.

The claimant further prayed for costs and interest. In view of the fact that the claimant was not represented and taking into account that he had to pay filing fees, pay for swearing of affidavits and reasonable attendant expenses, I award the claimant costs of Kshs.10,000 which in my opinion is reasonable to cover disbursements.

Conclusion

In conclusion therefore I find that the claimant was an employee of the respondent, that his suit is properly before this court. I declare the termination of employment of the claimant unfair and award him a total sum of **Kshs.131,103.50/=**.

The award in respect of notice and leave shall attract interest from the date of filing suit while compensation and costs will attract interest from date of judgment.

DATED AND SIGNED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 10TH DAY OF MAY 2018

MATHEWS NDERI NDUMA

JUDGE