



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 970 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 2<sup>nd</sup> July, 2018)**

**KUDHEIHA WORKERS.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT OF**

**CHRISTIAN INDUSTRIAL TRAINING CENTER.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit on 9<sup>th</sup> May 2014 on behalf of the two grievants Nichodemus Kalugho Shereta and David King'oo Nzangi seeking damages for their unpaid dues. The Claimants aver that they have a recognition agreement with the Respondent, the first having started way back in 1990 on 7<sup>th</sup> June 1990 when both parties signed the recognition agreement whose purpose was to comply with the directives of Section 57 of the Labour Relations Act 2007. The last CBA being that of 2010 and 2011.
2. They further aver that the Respondent employed the two grievants in different positions with different salaries and different house allowances. The first grievant was employed on 1<sup>st</sup> November 2000 with a basic salary of Ksh.12,000 per month as an Accounts/Store Clerk. He was locked out of joining a trade union and after serving the Centre obediently and tirelessly, he was deployed to the position of the Senior Accountant.
3. After serving the Respondent for eleven years without any warning letter, the 1<sup>st</sup> grievant tendered his resignation letter to the Respondent dated 20<sup>th</sup> July 2011 with effect from the date of the letter to November. He accepted to forfeit 7 days while on leave for the month of October and the whole month of November from his gratuity.
4. He avers that he had gone for training and as is policy of the institution, workers who attend such training get refund of fees by the institution and he wrote letters to the Respondent for acting allowance and for refund of college fees which the Respondent acknowledged receipt where they expressed unwillingness to pay gratuity, responsibility allowances and college fees refund.
5. The second grievant was employed on 1<sup>st</sup> February 1984 as an electrician at a basic salary of Ksh.2,000 per month and without house allowance. He was a dynamic employee who had no problem with the Respondent for the last 27 years of service that made him earn several promotions.
6. On 23<sup>rd</sup> June 1997 he was given an appointment letter on promotion as acting Production Officer and on 21<sup>st</sup> September 1997 he was deployed as Maintenance Foreman. He was also deployed as Electrical Installation Instructor and Head of the new department without any appointment letter where on 3<sup>rd</sup> February 2003 he wrote a letter requesting his appointment letter. In January 2009 the grievant and other staff were ordered to leave the union so that they could enjoy the Diocese of Nairobi terms of service 2009 salary guidelines.
7. After all the staff withdrew from the union, the Respondent implemented the ACK church guidelines by increasing 50% house allowance, 50% travelling allowance and responsibility allowance as per Diocese of Nairobi terms of service 2009 salary guidelines. After the employees had received the new terms, they discovered that they were at a risk and they decided to go back to the union for security purposes.
8. On 24<sup>th</sup> November 2009 the grievant was given a new appointment letter on promotion as production liaison officer without salary increment and allowances. On 6<sup>th</sup> January 2010 he was given other responsibilities of supervising the hostel with no extra payment.

9. On 24<sup>th</sup> June 2010 four workers including the two wrote to the management asking for a request to consider what they were doing by serving the institution diligently by paying the responsibility allowances which were not paid and after serving the respondent for 27 years the second grievant tendered his resignation notice dated 31<sup>st</sup> May 2011 of 4 months, to commence with effect from 1<sup>st</sup> June to 30<sup>th</sup> September 2011 which was acknowledged on 9<sup>th</sup> August 2011. The Respondent indicated that they were not ready to pay gratuity.

10. The Claimant aver that the Respondent failed to remit the grievant's provident fund contribution for 2000, 2001 and 2009 to Anglican Church of Kenya Staff Provident Fund on time as required and as a result, the grievant could not receive interest and bonus for un-remitted contributions from the fund and after trying to resolve the issue at hand failed, he applied Section 62(1) of the Labour Relations Act 2007. The Minister had to apply Section 65(1) of the Labour Relations Act of 2007 by appointing a Conciliator.

11. The Conciliator failed to exercise her powers under Section 67 and 69 of the Labour Relation Act by inviting the parties for reconciliation meeting and through the silence he decided to file this matter in this Honourable Court.

12. The Respondent filed reply to Memorandum of Claim where they admit that the grievants were their employees but aver that the Anglican Church of Kenya (Diocese of Nairobi) terms of Service 2009, took effect on 1<sup>st</sup> January 2009 while the Collective Bargaining Agreement came into effect on 1<sup>st</sup> January 2010. The two grievants were employed before the CBA between the parties came into effect.

13. They state that the Constitution and the statutes relied on or mentioned were not applicable to the employment contract of the grievants at the time of their appointment and hence they are put to strict proof of the allegations to the contrary.

14. They further deny that the grievant was entitled to refund of any college fees as alleged and that on the issue of the new contract of employment, it was agreed that the new contract would not attract increase in salary or allowances hence the grievant is not entitled to any responsibility allowance.

15. They further aver that the grievant has not demonstrated how the alleged accrued interest has been calculated and he is put to strict proof of the figures. They also state that it held various meetings involving the Claimant but the meetings did not bear fruit.

### **Submissions**

16. The Claimants filed their submissions where they submit that the first grievant in this matter was not a policy maker to be denied the opportunity of joining the union as is reflected under letter of appointment.

17. They aver that after the Respondent had been notified through a letter dated 29<sup>th</sup> November 2011 over the unremitted provident funds together with interest, they never took an initiative of responding or acting to the same. That it was only after the grievant had left employment that the Respondent got the opportunity of remitting the funds to the provident fund without an interest which has accrued to Kshs.161,440.74.

18. The Respondent filed their submissions where they submit that on 5<sup>th</sup> May 2011 the 1<sup>st</sup> grievant wrote a letter requesting for refund of university fees as he had gone to study Bachelor of Business Management finance option. The Board of Christian Industrial Training Institute had not advised him to advance education in terms of the degree hence they should not grant monies claimed as refund of college fees.

19. They further submit that on 20<sup>th</sup> July 2011, the 1<sup>st</sup> grievant resigned and in the said resignation letter, he cited his position as CITC Accountant which is not true as he was an accountant at the time and has not proved to this Court that a letter was written by the Respondent asking him to take over the position of the Senior Accountant.

20. They aver that when the 1<sup>st</sup> grievant resigned he was on leave. His leave was to end on 12<sup>th</sup> October 2011 thus forfeiting his salary for 7 days in October 2011 and November 2011. They also state that he seeks gratuity which is payable under Section 35(5) of the Employment Act but subsection 6 states that the section does not apply when one is a member of a registered pension or provident fund scheme, hence he is not entitled to gratuity payment.

21. The Respondent avers that the 2<sup>nd</sup> grievant was deployed as a Maintenance Foreman on 21<sup>st</sup> September 1999. The letter of appointing him was clear that the position would not attract extra payment. They state that he resigned on 31<sup>st</sup> May 2011 and that his reasons for resignation were personal. He did not cite any frustration in the said letter. They further state that the positions he held were on a similar level and did not mean appointment to higher rank and were thus not promotions.

22. They further aver that on the issue of gratuity which is payable under Section 35(5) of the Employment Act, subsection 6 states that the section does not apply when one is a member of a registered pension or provident fund scheme.

23. They aver that he was contributing to the ACK staff provident fund as well as NSSF hence he is not entitled to service gratuity payment. They state that he claims an abstract figure of Kshs.73,572.55 but does not provide any calculations as to how the figure was arrived at and on the issue of leave allowance, he has not adduced sufficient evidence before this Honourable Court evidencing that the same was not paid to him. They therefore submit that the claims before this Honourable Court are an abuse of the Court process and pray that the Court dismisses the claim with costs to them.

24. I have considered evidence and submissions of both parties. The grievants herein resigned from the employment of the Respondent and what they seek is payment of their terminal dues.

25. The first grievant seeks payment of refund of university fees having studied Bachelor of Business Management Finance Option. The Respondents submitted that they had not advised him to pursue the said studies.

26. The Claimant made no effort to prove that indeed the Respondent and grievant had a policy on refund of fees of university education. The grievant failed to point out the policy document to Court.

27. On gratuity, the grievant had submitted that they were members of the Respondent's Provident Fund. By virtue of Section 35(6) of Employment, they are therefore not entitled to payment of gratuity.

28. At to the other claims levelled by the Claimants, they have not exhibited any documents entitled to them. No documents were shown to Court that show the requirement to pay responsibility allowance.

29. I find the claim by the Claimants is not merited. I dismiss it accordingly with no order as to costs.

**Dated and delivered in open Court this 2<sup>nd</sup> day of July, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties