



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

DISPUTE CAUSE NO. 1700 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd October, 2018)

WILSON O. OWAGA.....CLAIMANT

VERSUS

APOSTLE OF JESUS GENERALATE.....RESPONDENT

JUDGEMENT

1. The Claimant instituted this claim through his Statement of Claim dated 5th October, 2011 and filed on even date together with supporting documents through Lumumba, Mumma & Kaluma Advocates, alleging unfair and unlawful termination of his employment by the Respondent. Later, the firm of K' Bahati and Company Advocates came on record.

2. The Claimant testified that he was employed by the Respondent as a Cook vide a letter dated 24th September, 2007. He stated that he worked diligently and was never involved in any disciplinary issues or given any warnings. He was married and, like all other staff, living within the work premises in the staff quarters. He was not a priest.

3. He gave evidence that on the evening of 28th April, 2010, he was summoned to Father Mashauri's office, who was part of the management. He obeyed the summons though unaware of the cause. Upon arrival, he found Father Mashauri and other management staff, who quizzed him concerning the alleged bad behavior of his wife and strained relationships with other staff members including priests.

4. The Claimant testified that he defended his wife, saying that there was a particular member of staff who held a grudge against his family, as the Claimant had reprimanded him over behaving immorally towards the Claimant's wife by entering the shared washroom while she was showering.

5. The Claimant also referred to another incident when his son destroyed some flowers in the garden and the issue had been resolved. He explained that he was willing to stay outside the work premises if the issues could not be settled, so that his family was safe and he could continue working. In addition, he testified that Father Mashauri agreed to let him rent a house outside and after leaving the meeting, the Claimant embarked on looking for a house to move into. He never indicated he was willing to leave his employment.

6. He stated that, on 10th May, 2010, he was again summoned in the evening to Father Mashauri's office, where he was handed a letter of termination dated on 10th May, 2010. Father Mashauri explained to him that the Respondent had decided that his services were no longer needed, and that he should leave the premises with his family within seven (7) days. He then told him to sign the letter. Again, the room only had management staff, and feeling intimidated and fearing for the safety of his family, he signed the letter and accepted the monies paid as final terminal dues.

7. The letter indicated that the reasons for termination were:

- i. Your wife has obstructed the peace of the majority of your fellow employees even some of our priests are not at peace with her.*
- ii. You have categorically defended the bad behavior of your wife by asserting that some employees are at enmity with her and hence at enmity with you.*
- iii. When we had a one hour meeting with you on 28/4/2010 you expressed your great joy for having been asked to leave the premises with your family safely and sound.*

8. During cross-examination, the Claimant confirmed that he received the monies indicated in the letter of termination, but only signed the letter out of intimidation. He also confirmed that he himself had a good relationship with fellow staff and his wife was not engaged in any wrongful behavior.

9. The Respondent filed their Memorandum of Reply on the 14th of September 2012 denying the claim. During defence hearing, Father Mugendi also testified that he joined the Respondent in 2015 and was therefore absent at the time of the Claimant's termination. He was therefore only able to reiterate what was in the documents before the Court and nothing more. No minutes were taken or produced at the time.

10. The Claimant submitted that the Claimant's termination was unfair because:

i. The reasons for termination stated in the letter of termination had no connection with the regulations set out in the letter of appointment;

ii. The reasons for termination did not warrant summary dismissal under Section 44 of the Employment Act;

iii. The reasons for termination were invalid and unfair under Section 45 of the Employment Act as the Claimant did nothing wrong and the Respondent had no operational requirements which the Claimant failed to fulfill and the Claimant was willing to move his family out of the compound so that the alleged friction with his wife and staff can become non-existence, but the Respondent's management maliciously used that against him;

iv. The Claimant was not notified of the allegations against him and given an opportunity to prepare himself. Father Mugendi testified that he is not aware of any written statements concerning the incident and, the Claimant testified he was summoned orally the same day;

v. The Claimant was not issued with a notice to show cause why his employment should not be terminated-he was never aware that the management was considering terminating his employment;

vi. The Claimant was not afforded an opportunity to face his accusers or a conducive environment to explain himself/ be heard-he was summoned at night and only management staff were in the meeting;

vii. The Claimant was not issued with any warning letters as per the Memorandum of Agreement(MOA) signed with the union-the Respondent's letter dated 24th May, 2010 indicating that the Respondent had used all avenues available is misleading;

viii. The Claimant was not issued with a Certificate of Service as per clause 13 of the MOA.

11. The Respondent did not file any submissions.

12. I have examined all evidence and submissions adduced before me by all parties. The issues for determination are as follows:-

1. Whether there were valid reasons to terminate the Claimant's services.

2. Whether due process was followed.

3. What remedies to grant in the circumstances.

13. As indicated above in Claimant's submissions, the termination was based on reasons relating to matters not related to the employment or performance of the Claimant. The issue related to the relationship between the Claimant's family and other staff. These in my view were not valid reasons as envisaged under Section 43 of the Employment Act which states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

14. On the second issue, the Claimant was not accorded any fair disciplinary hearing as envisaged under Section 41 of the Employment Act which states as follows:-

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on

the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

15. It is my finding therefore that the termination of the Claimant was unfair and unjustified as provided for under Section 45(2) of the Employment Act which states as follows:-

(2) “A termination of employment by an employer is unfair if the employer fails to prove:-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

16. In terms of remedies, I find for the Claimant and award him as follows;

1. Compensation equivalent to 8 months’ salary for unfair termination=8x16174= 129,392/=

2. Issuance of a Certificate of Service to the Claimant forthwith.

3. The Respondent to pay costs of this suit plus interest at Court rates

Dated and delivered in open Court this 22nd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Olenda holding brief for Bahati for the Claimant

No appearance for Respondent