



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.273 OF 2015**

**DENIEL ONSORO.....CLAIMANT**

**VERSUS**

**CHRIST THE KING ACADEMY**

**ST. MARY'S CAFÉ.....RESPONDENT**

**JUDGEMENT**

Issues in dispute – redundancy, underpayments of wages, unfair contracts.

**Claim**

1. The claimant, a male adult was employed by the respondent, a Christian Organisation operating under the Catholic Diocese of Nakuru. The claimant was employed on 1<sup>st</sup> March, 2007 as a Cook at the St. Mary's Pastoral Centre. Upon employment, the claimant was earning Kshs.5, 000.00 per month and a housing allowance of Kshs.1, 000.00 per month. In May, 2008 the wages remained the same.

2. On 15<sup>th</sup> June, 2015 the claimant was laid off over redundancy. This was after working for the respondent for over 8 years with a clean record.

3. The respondent retained the claimant under short term contracts unlike other employees. The last contract of employment was to end on 31<sup>st</sup> December, 2016 but was terminated on 15<sup>th</sup> June, 2015 before its due date. Such termination of employment was without justifiable reasons.

4. In the letter dated 15<sup>th</sup> June, 2015 the respondent stated that its board of management for St. Mary's Café had decided to wind up the café so that the claimant was found redundant. On equal date, the entire staff of the respondent, the manager of St. Mary's Café together with the human resource manager of Catholic Diocese of Nakuru met the workers at 5.00pm and told everybody that a decision had been taken to close the cafeteria by 15<sup>th</sup> July, 2015 on the grounds that the café was not making a profit.

5. The claim is that the issuance of short term contract to the claimant was in abuse of the law. By terminating employment on a contract that was on-going on 15<sup>th</sup> July, 2015 the respondent failed to take into account the unexpired term and the reasons given for redundancy had no justification as nothing had been done to avoid the redundancy. It was not in good faith.

6. The claims are that there were underpayments in the contracts issued to the claimant;

Contract issued in 2007 there is a claim for Kshs.11, 785.00;

Contract of 1<sup>st</sup> May, 2009 claim for Kshs.9, 061.20; Contract of 1<sup>st</sup> May, 2010 claim for Kshs.11, 401.80;

Contract of 1<sup>st</sup> May, 2011 claim for Kshs.22, 552.20;

Contract of 1<sup>st</sup> May, 2012 claim for Kshs.35, 692.80;

Contract of 1<sup>st</sup> May, 2013 claim for Kshs.4, 270.80; and

Contract of 1<sup>st</sup> May, 2015 to 15<sup>th</sup> July, 2015 claim for Kshs.4, 414.05.

7. The claimant is also seeking payment until his retirement at age 55 as the respondent did not allocate him with alternative employment. That he was not allowed to complete each issued contract of employment and should be paid for the balance periods.

8. The claimant is also seeking pay for lunch hour never allocated and was not put into account. Under each contract there was allowance for a lunch break but due to the nature of work as a cook, the claimant was not able to take such breach. The claim is for Kshs.30, 683.20.

9. The claims set out are that judgement should be allowed for;

- a) *One month notice pay Kshs.12,071.35;*
- b) *Underpayments Kshs.99,177.85;*
- c) *One hour lunch break Kshs.30,683.20;*
- d) *Life period of contract Kshs.347,146.20;*
- e) *Compensation Kshs.144,856.80;*
- f) *Damages Kshs.253,499.40;*
- g) *Costs*
- h) *Certificate of service*

10. The claimant testified in support of his claims. The claimant testified that upon employment he was issued with letters of employment and term contracts and upon each end he was issued with a new contract but he was underpaid. On 15<sup>th</sup> June, 2015 while he was serving on a new contract the respondent called all employees at St. Mary's café and told them that the cafe was not making a profit and would close down on 15<sup>th</sup> July, 2015. The claimant had not completed his contract at the time and was not paid for the due term. It was due for 17 months.

11. The claimant also testified that he was entitled to a lunch break under each contract. As a cook he never took such time but he had his meals while at work. He was not given sufficient time to take his lunch.

## **Defence**

12. In response, the respondent's defence is that on 1<sup>st</sup> March, 2007 they employed the claimant as a Cook and issued him with a letter of employment and stationed at the St. Mary's Pastoral Centre. The claimant was laid off following redundancy which was justified and for a valid reason vide letter and notice of 15<sup>th</sup> June, 2015 taking effect on 15<sup>th</sup> July, 2015. The respondent board of management met the claimant and other employees to hold consultations and give them an explanation and being unable to secure new employment for the staff at the café, issued the requisite notice.

13. The claimant was paid his final dues vide letter dated 20<sup>th</sup> July, 2015 and amounting to Kshs.67, 861.80. Such dues had been tabulated and brought to the attention of the claimant vide letter dated 1<sup>st</sup> July, 2015 and a cheque dated 15<sup>th</sup> July, 2015.

The claimant is thus not entitled to claims of notice, underpayment, lunch allowance, compensation or any claims as outlined in the memorandum of claim. Such claims are not justified.

14. The respondent called Mr Jimna Mwangi, the human resource manager and who testified that he knew the claimant who was working at the St. Mary's Cafeteria from 2007 to 2015. The claimant was serving under periodic contracts the last being for 3 years and ending 31<sup>st</sup> December, 2016.

15. The claimant's employment was terminated on 15<sup>th</sup> July, 2015 as the entity was not making profits and it was closed down. A notice was issued to this effect. The claimant was paid in lieu of notice for one month. Termination was due to redundancy terminal dues were paid at Kshs.67, 861.80 for;

Notice pay for up to 15<sup>th</sup> July, 2015 Kshs.6, 000.00;

Pending leave days Kshs.6, 000.00;

Severance pays Kshs.42, 000.00;

Underpayments Kshs.1, 861.80;

One month salary Kshs.12, 000.00

16. At the close of the hearing both parties filed written submissions.

17. The claimant has filed suit against Christ the King Academy St. Mary's Café. Even though no party raised the subject, it is important for the court to address the question of the person/entity of the respondent.

18. The Employer was **Catholic Diocese of Nakuru** and not *Christ the King Academy St. Mary's Café*. Paragraph 2 of the Memorandum of Claim, the claimant has well defined who his employer was, the Catholic Diocese of Nakuru. Records attached to the Memorandum of claim also confirm this fact – the letter of appointment, pay statements and the contract of employment. The respondent herein is not a proper party. No lawful orders can issue against such a party, Christ the King Academy St. Mary's Café. Despite the respondent admitting to the descriptive parts of the claim, the fact of the respondent being the wrong party before court is clear to this court.

19. No orders can issue against a wrong party. This would defeat justice.

20. The above put into account and well aware that this court should address substantive questions before it, it would aid justice to address the claims made even where no orders can issue against the respondent as sued.

21. The claimant admits that he was under fixed term contracts under his period of employment with the respondent. His last contract was to run for the period ending 31<sup>st</sup> December, 2016 but was terminated on 15<sup>th</sup> July, 2015 following a redundancy notice issued by the respondent on 15<sup>th</sup> June, 2015.

22. Section 40 of the Employment Act, 2007 read together with section 43 allows an employer to terminate employment on account of redundancy subject to a notice being issued to the employee stating the reason(s) thereof.

#### 40. Termination on account of redundancy

*(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*

*(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*

*(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer:*

[Emphasis added].

23. Where the employer has issued the requisite notice to the employee setting out the reasons for the intended redundancy and the notice being not less than a month prior, by application of section 43 there exists a genuine and valid reason leading to termination of employment and such meets the provisions of section 45

*(2) that the same is as a result of operational reasons and therefore justified.*

*(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*

24. The Court of Appeal in **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** held that;

*It is common ground in this case that the respondents were not members of a union and therefore the notice they were entitled to ought to have been issued in accordance with section 40 (1) (b). The purpose and period of the notice was construed in the case of **Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR** to be the same as provided for in section 40 (1)*

*(a), that is, 'the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect'. It is mandatory to serve the same notice on the Labour Officer.*

25. in **Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR** The Court held that in a redundancy;

*... the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Courts have held that*

*employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.*

26. In this case, by the respondent officers meeting the claimant together with other employees in the St. Mary's cafeteria and informing them that the business was not running at a profit and would thus close had a valid and genuine reasons leading to the declaration of redundancy. Such meeting and explanations were followed with a written notice of one month and taking effect on 15<sup>th</sup> July, 2015. Effectively, employment terminated following the due process of the law the same relating to operational reasons and notice to the claimant. There was no unfairness in such process.

27. The claimant has admitted to being under written contracts for the entire period he was in the service of the respondent. where any claim may lie against the employer, Catholic Diocese of Nakuru, such claim must abide the provisions of section 90 of the Employment Act, 2007. Each employment contract had its term and upon lapse, where there was any claim(s) arising therefrom for underpayment or unpaid dues for its term, such out to have been addressed within the limitation period.

28. The claim was filed on 25<sup>th</sup> September, 2015. Save for claims going back to September, 2012 no other claim can stand.

29. As noted above, the respondent herein being the wrong party, claim against the claimant's employer, Catholic Diocese of Nakuru arising from any contract as of this date where not filed, has since been overtaken by events.

**Effectively and as set out above, the claims against the respondent are without merit and must be dismissed noting the respondents did not address the question of the wrong party sued as respondent in this regard, each party to bear own costs.**

Dated and delivered at Nakuru this 3<sup>rd</sup> day of October, 2018.

**M. MBARU JUDGE**

In the presence of: