



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.443 OF 2015

**KENYA UNION OF EMPLOYEES OF VOLUNTARY
AND CHARITABLE ORGANISATIONS (KUEVACO)CLAIMANT**

VERSUS

REDEEMED GOSPEL CHURCH (INCOPORATED)..... RESPONDENT

JUDGEMENT

1. The claimant is a trade union registered under the Labour Relations Act, 2007 and the respondent is a religious association registered in Kenya.
2. The claim is that George Peters Ayamba (the grievant), a member of the respondent's congregation and a Sunday school teacher with the respondent's Pastoral and Social Work was employed on 1st July, 2003 as a Social Worker at a monthly wage of Kshs.4, 000.00. in breach of section 40 of the Employment Act, 2007 on 30th June, 2009 the respondent verbally terminated the grievant on the grounds that the respondent could not sustain 4 social workers at the project, Belgium Tear Fund Department. The grievant was then declared redundant but the same was procedurally wrongful.
3. At the time of termination, the grievant was earning Kshs.16, 516.50 per month. The grievant did not take his annual leave for 4 years and thus claim for a total 120 days of leave.
4. In April, 2008 the grievant got sick and was treated at a cost of Kshs.4, 345.00 and claim the same from the respondent in accordance with section 34 of the Employment Act, 2007. The grievant was not registered with NSSF and the respondent never made deductions of remittances for him.
5. Upon the termination of the grievants employment, the claimant reported the dispute to the minister on 28th June, 2010, the minister accepted the same and the matter was not resolved at reconciliation. The claimant has therefore invoked the provisions of section 73 of the Labour Relations Act.
6. The claim is for reinstatement of the grievant to his position held with the respondent; notice payoff 36 months all at Kshs.594, 594.00; severance pay all at Kshs.49, 594.50; annual leave all at Kshs.66, 066.00; medical claim at kshs.4, 345.00; NSSF contributions for 6 years all at Kshs.28, 800.00; and compensation at Kshs.594, 594.00. The claimant is also seeking for interests of the claimed amounts and costs of the suit.

Defence

7. In defence, the respondent's case is that the claim is incompetent by dint of section 90 of the

Employment Act, 2007; there was no contract of service between the claimant and respondent; the aggrieved party has not lodged the suit.

8. The respondent's case is also that there was no employment relationship between the parties and the grievant was at all material times a volunteer on part time basis and was paid an allowance from funds channelled through the respondent by sponsors from Belgium. Such funds were exhausted without replenishment and the grievant was updated that his position was untenable.

9. The claims made are not due and should be dismissed with costs.

10. Parties agreed to address the suit by way of written submissions and oral highlights of the same.

11. The claimant submits that a suit filed with regard to dismissal and redundancy under the provisions of section 62(3) and (4) of the Labour Relations Act, 2007 the provisions of section 90 of the Employment Act, 2007 do not apply. The grievant was not a volunteer with the respondent; he was paid a monthly wage as he was on full time employment. The allegations that the grievant was terminated following funds from Belgium Tear Funds are a misrepresentation of facts meant to avoid payment of the claims made against the respondent.

12. The provisions of section 40 of the Employment Act, 2007 were not followed in declaring the grievant redundant. It was unprocedural and wrongful and the claims made are due.

13. The respondent submits that the respondent is a registered church and the word *incorporated* is a misnomer as it is not a body corporate as held in **Republic versus Registrar of Companies & 2 others ex parte Bishop Morris Mwarandu, interested party Redeemed Gospel Church Inc. & Another [2014] eKLR.**

14. The respondent also submit that the suit is incompetent and there is no jurisdiction as suit commenced 3 years after the cause of action arose and thus contrary to mandatory provisions of section 90 of the Employment Act. The claim that the grievant was employed and his employment terminated on 30th June, 2009 but the suit was filed on 23rd March, 2015 clearly outside the limitation period.

The claim is filed under the name of the claimant trade union allegedly representing the grievant who is not a party to these proceedings. The Verifying Affidavit is sworn by the grievant yet the claim is by the claimant union and drawn by the secretary general. Such is a misrepresentation of facts and makes the suit incompetent. The claimant lacks *locus standi* to file the claim.

15. The respondent also submits that the grievant was a volunteer with the respondent under a Belgium Tear Fund project which ended after funds were exhausted. There was therefore no employer and employee relationship between the respondent and the grievant. That the allowances paid were not equivalent to a salary to justify the claims made.

Determination

The matter herein raises several salient questions that must be addressed;

The nature of the claimant relationship with the respondent and by extension that of the grievant;

Whether the grievant was an employee of the respondent

Whether the court has jurisdiction over the matter; and

Whether the remedies sought are due.

16. The claim is premised on the claimant representing the grievant under the provisions of the Labour Relations Act, 2007. That the grievant was employed by the respondent as a social worker and following

a redundancy situation was wrongfully terminated from his employment. That such employment was terminated on 30th June, 2009 and the suit was filed on 23rd March, 2015.

17. The claim is filed by the claimant, a registered trade union under the Labour Relations Act, 2007.

18. Under section 62 of the Labour Relations Act, 2007 a trade union is allowed to report a dispute to the minister in a case of termination or dismissal of an employee from his employment. By the minister taking up such a report, I take it the basic principles and facts of whether such union should be the one to report the same is addressed. In this case, when the minister accepted the claimants report with regard to the grievant and appointed a conciliator vide letter dated 12th November, 2010 the question of the standing of the claimant in this dispute was resolved.

19. Representation of an employee by the union in matters filed with the court is allowed under the provisions of section 22 of the Employment and Labour Relations Court Act, 2011. Membership of the grievant with the claimant is not challenged and thus by operation of the law, the claim as filed by the claimant and procedural.

20. The issue in dispute herein is the alleged unprocedural redundancy of the grievant, George Peters Ayamba. The respondent admits that the grievant was serving with them as a volunteer under a Belgium Tear Fund. The project funds got exhausted and the grievant was advised that his position was no longer tenable.

21. Such facts directly speak to the question of the respondent allocating the grievant work and which work had to terminate due to exhaustion of funds. Whether the grievant was an employee or volunteers is lost in the verbal nature of matters communicated to the grievant. Where the grievant was a volunteer with the respondent, such evidence is not submitted by the respondent. The matter is left open for the grievant to interpret the nature of his relationship with the respondent.

22. In terms of section 8, 9 and 10 of the Employment Act, 2007 where there is allocation of work duties of the nature the grievant was allocated as social worker, he was paid wages at equal intervals and monthly, without any documentation to the contrary, such translates to employment of the grievant by the respondent. Where the respondent enjoyed the labours of the grievant paid him monthly and such labours and or employment was terminated due to exhaustion of funds, such a scenario directly speaks to matters well addressed under section 40 of the Employment Act, 2007.

23. With that finding that there was an employment relationship between the grievant and the respondent and that the claimant has *locus standi* herein as the representative union for the grievant, the other question that the court must address is that of jurisdiction.

24. the *dicta* that jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the court to pause and determine the issue before proceeding with the case is herein important to address first as held in the Supreme Court of Kenya in the cases of **In Re The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**

25. In this case therefore on the question of jurisdiction raised by the respondent, section 90 of the Employment Act, 2007 is stated in mandatory terms and provides as follows;

s.90. Limitations Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

26. In this regard, all suits premised under the provisions of the Employment Act, 2007 and seeking

remedies of the nature of an employer and employee relationship or matters addressed and forming the basis of the claim being premised on an employment relationship should be filed with the court within 3 years from the date when the cause of action arose.

27. In addressing whether the limitation period under section 90 of the Employment Act, 2007 can be extended, the court in **Maria Machocho versus Total (K) Industrial Cause No. 2 of 2012, held as follows;**

Before the coming into operation of section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in Section 4(1) of the Limitation of Actions Act, and it was 6 years. Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the Employment Act specifically.

28. The claimant has relied on the provisions of section 62 and 73 of the Labour Relations Act < 2007 and 78 of the Employment Act, 2007 to assert that the claim herein relates to the dismissal of the grievant and the provisions of section 90 of the Employment Act, 2007 do not apply. Indeed section 62 allow a trade union to report a dispute to the minister and section 73 provides that where the minister is unable to resolve the dispute after reference to conciliation, the same may be referred to the court. Section 87 of the Employment Act, 2007 on the other hand provides that a party may lodge disputes with the court where the same relates to a complaint between an employer and employee and where the matter relates to a contract of service.

29. The context of sections 62 and 73 of the Labour Relations Act, 2007 and section 87 of the Employment Act, 2007 must take into account the provisions of section 90 of the Employment Act, 2007. All disputes arising out of an employment relationship and premised on the rights under the Employment Act, whether filed by the employee or by a trade union as a claimant or by the employer or as the case may be, such must be lodged with the court in accordance with section 90. The time limitation therein is set in mandatory terms.

30. In **Fred Mudave Gogo versus G4S Security Services (K) Ltd [2014] eKLR** the court held that a claim based on the provisions of the Employment Act, 2007 must comply with mandatory provisions of section 90 of the Employment Act and be filed within 3 years from the time when the cause of action arose. This position is given emphasis by the *Court of Appeal in E.Torgbor versus Ladislaus Odongo Ojuok [2015] eKLR.*

31. Noting the above, the cause of action having arisen with the termination of the grievant on 30th June, 2009 and suit having been filed on 23rd March, 2015, such is a period of over three (3) years contemplated in law and the suit in whichever front cannot stand. The court lacks jurisdiction to award the remedies sought. The report of the dispute to the minister under the provisions of section 62 of the Labour Relations Act, 2007 in itself does not extend the time limitation set out under section 90 of the Employment Act.

32. The claim herein must therefore fail for want of jurisdiction. Noting the detailed submissions made by both parties, the legal issues addressed, such I find to be worth of note as these promote the jurisprudence of the court. Each party shall bear own costs.

Suit is hereby dismissed for want of jurisdiction pursuant to the provisions of section 90 of the Employment Act. Each party shall bear own costs.

Dated and delivered in open court at Nairobi this 20th day of July, 2017.

M. MBARU

JUDGE

In the presence of:

Lilian Njenga and David Muturi – Court Assistants

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