



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 4 OF 2016 CONSOLIDATED WITH CAUSE NO.5 OF 2016

MARY KAUNGANIA NKARI.....1ST CLAIMANT

AND

KABERIA ISAAC KUBAI.....2ND CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 3rd June, 2016)

JUDGMENT

The claimants filed their respective statements of claims on 05.05.2016 through Sichangi Partners Advocates. Each of the claimants prayed for judgment against the respondent for:

- a. A declaratory order that the claimant was and is still entitled to the enjoyment of rights and freedoms guaranteed under Articles 41(2) (a) and 47 (1) and (2) of the Constitution of Kenya 2010.
- b. A declaratory order that at all material time the claimant was and is still entitled to the full and unlimited enjoyment of the statutory rights secured under the Employment Act Cap 226 Laws of Kenya.
- c. A declaratory order that the termination of the claimant's employment was unconstitutional, unlawful, contrary to the rules of natural justice, non-procedural, null and void and therefore of no effect.
- d. An order to compel the respondent to pay the claimant gratuity as per the respondent's terms and conditions of service.
- e. An order to compel the respondent to pay the claimant underpaid or unpaid leave days.
- f. An order to compel the respondent to pay the claimant unpaid dues for the remainder of the contract period.
- g. Costs of the claim plus interest at court rates.

The 1st claimant further made prayers against the respondent for:

- a. A declaratory order that the respondent's act of placing the claimant in the wrong job group and further ignoring the claimant's pleas to correct the same was unconstitutional, unlawful, contrary to the rules of natural justice, non-procedural, null and void and therefore of no effect.
- b. An order to compel the respondent to pay the claimant salary arrears owed to her from the year 2005 as a result of wrongful job placement as well as underpaid leave allowance.

The respondent filed the statements of response in the two cases on 31.03.2016 through M.M. Kioga and Company Advocates. The respondent prayed that the claimants' respective suits be dismissed with costs.

The 1st claimant was employed by the respondent on three years' term contract as the respondent's chaplain. The first of such contract was effective sometimes in 2005. The last of such contract was renewed on 10.05.2013 and was due to expire in May 2016.

The 2nd claimant was also employed by the respondent as a lecturer and the head of department of Theology and Counseling. He was employed upon three year's contract renewable. He was initially employed sometimes in 2010 and his last contract was renewed on 12.09.2014.

Prior to employment by the respondent, the claimants served as ministers of the Methodist Church in Kenya and the Bishop of the Church is also the Chancellor of the respondent. The claimants' letters of appointment stated that they had been offered employment by the University Council and the appointment would be on secondment terms from the Methodist Church in Kenya for 3 years, renewable. The employment was subject to the respondent's rules and regulations for the time being in force and amendable from time to time.

The 1st claimant's contract of employment was terminated by the respondent's letter dated 4.01.2016. The letter stated that the 1st claimant's employment had been terminated effective 11.01.2016 on the ground that by the letter dated 23.12.2015, the church had withdrawn the claimant's secondment from the church to the service of the respondent. The 2nd claimant's employment was equally terminated by the letter dated 4.01.2016 effective 11.01.2016 and on the same grounds as the termination of the 1st claimant.

The **1st issue** for determination is whether the secondment having been given by the church for 3 years, the same was amenable to withdrawal before the lapsing of the 3 years. The letters of appointment or renewal of appointment are clear that the claimants' appointment was on secondment terms from the Methodist Church in Kenya for 3 years renewable and based on approval from the Presiding Bishop, Methodist Church in Kenya. Once the approval for secondment was given for 3 years, the court finds that the claimants shifted their financial and other arrangements to serve the respondent for 3 years. Section 10(7) of the Employment Act, 2007 vested upon the respondent the burden of proving or disproving an alleged term of employment. The respondent has failed to show that it was a term of employment of the claimants that the claimants' employment would be terminated if the subsisting approved secondment was withdrawn prior to lapsing of the 3 years of the approved service. Section 10(5) of the Act requires the respondent to consult the claimants for any change in the terms of employment and to notify the claimants in writing of any such change but the respondent failed to act in accordance with that provision. The court finds that the respondent could not unilaterally vary or introduce the issue of withdrawal of the secondment. The court further holds that once the agreement concluded, the parties were bound to the 3 years' approved secondment and once the Bishop gave the approval, nothing was left with him of the power to approve that was subject of a recall- the power to approve was exhausted once the approval was given and the Bishop became *functus officio*.

The **2nd issue** for determination is whether the termination of the claimants' employment by the respondent was unfair. The court finds that the reason for termination was invalid as it was unreasonable and the termination was unfair under section 43 of the Employment Act, 2007. Further, the court considers that as submitted for the claimants, the respondent acted unreasonably by terminating the employment on account of withdrawal of approval for secondment by the Bishop because as already found, that amounted to unilateral rewriting of the contract without involving the claimants by way of consultation. The court returns that the termination of the employment was unlawful, in breach of the contract of employment between the parties and was unlawful as it was unreasonable administrative action under Article 47 (1) of the Constitution. The court further finds that the respondent's action to terminate the claimants' employment amounted to unfair labour practice in contravention of Article 41(1) of the Constitution.

The 3rd issue for determination is whether the claimants are entitled to the prayers as made in their respective statements of claim. The court finds that the claimants are entitled to the declaratory remedies in view of the findings made earlier in this judgment. The court has considered that the unfair termination would entitle the claimants to reinstatement or full compensation of 12 months' gross salaries under section 49(1) (c) of the Employment Act, 2007. The pay as claimed would be lower than the 12 months compensation under the section and taking all the circumstances of the case into account including that the claimants did not contribute in any manner to their removal, the court returns that the claimants are entitled to the pay for the remainder of the term of the contract – as they are entitled to partial reinstatement for that purpose. The claims for leave are justified and the court returns that the claimants are entitled to pay for all outstanding leave days. The claimants are also entitled to gratuity as prayed for.

The 4th issue for determination is whether the 1st claimant is entitled to salary arrears and underpaid leave allowance arising from wrong placement of the office of chaplain at MU12 instead of MU14B. The evidence on record is clear that the office of the respondent's chaplain is established at MU14B and not MU12. The claimant testified that the respondent concealed the details on the establishment structures and the pay attached to each job group and when she discovered, she demanded for the pay. She had executed the contracts as offered. The claimant has exhibited the letter dated 7.08.2015 she addressed to the respondent about the correction of her placement from MU12 TO MU14B and requesting the payment of the attached remuneration and allowances. The letter refers to earlier letters of 13.08.2013 and sometimes in 2014 about her grievance on wrong placement. The respondent appears to have failed to act to place the claimant in the correct job group.

The evidence is clear that the claimant was treated unfairly throughout her service. When she discovered the mistreatment as per the discriminatory and disadvantageous pay, the respondent refused to act to correct the injustice. The court holds that the respondent was bound under section 5(2) of the Employment Act, 2007 to promote equal opportunity in employment and to strive to eliminate discrimination in its employment policy and practice. The court further finds that the respondent was bound under section 5 (3) (b) not to discriminate the claimant in respect of promotion, terms and conditions of employment or other matters arising out of the employment. The court returns that the claimant has established that she was discriminated against by the respondent by being not placed in job group MU14B and that discrimination amounted to unfair labour practices under Article 41(1) and 41 (2) (a) and (b) of the Constitution. Accordingly, the court returns that the 1st claimant is entitled to prayers on underpayment as made pursuant to the provisions the respondent has been found to have contravened as cited and as read with the remedies available as envisaged in Article 23(3) of the Constitution and section 12 of the Employment and Labour Relations Act, 2011.

In conclusion judgment is hereby entered for the claimants against the respondent for:

1. The 1st claimant for orders in terms of the prayers a, b, c, d, e, f, g, and h in the statement of claim dated 11.01.2016.
2. The 2nd claimant for orders in terms of the prayers a, b, c, d, e, f, and g in the statement of claim dated 11.01.2016.
3. The claimants to compute; file; and serve in 7 days, from today, upon the respondent, the amount due in view of orders 1, and 2, above for mention on a convenient date with a view of recording the quantum in court.
4. The respondent to pay the claimants the amount due by 01.08.2016 failing interest to be payable thereon from the date of this judgment till full payment.
5. The respondent to pay the respective claimants' costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 3rd June, 2016.

BYRAM ONGAYA

JUDGE