



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 223 OF 2015

JULIUS KIMANI.....CLAIMANT

VERSUS

**REGISTERED TRUSTEES (ARCHDIOCESE OF NAIROBI, FARTHER IN-CHARGE,
ALL SAINTS CATHOLIC CHURCH, RIARA).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 22nd July, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 07.12.2015 through Ishmael & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Declaration that the termination of the claimant's employment was unlawful and violated the claimant's rights to fairness and fair labour relations as provided for in Article 50 of the Constitution and the Employment Act.
- b) Special damages amounting to Kshs.2,630,196.00 particularised in the memorandum of claim at paragraph 14 as 3 months' salaries in lieu of the termination notice Kshs.45,000.00; unpaid or accrued house allowances for 9 years Kshs.540,000.00; NSSF dues not remitted Kshs.43,200.00; leave pay for 9 years Kshs.135,000.00; accrued overtime and holidays Kshs.1,799,496.00; severance pay for years worked Kshs.67,500.00.
- c) General damages for unfair and wrongful termination of the claimant arising from the dismissal equivalent to 12 months' salaries.
- d) An order for issuance of a certificate of service for 9 years of employment.
- e) Costs of the suit and interest at court rates in (b) and (c) above.
- f) Any other relief the court may deem fit to grant.

The respondent's memorandum of defence was filed on 23.03.2016 through Nyiha, Mukoma & Company Advocates. The respondent prayed for:

- a) A declaration that the claimant's dismissal was fair and lawful.
- b) Dismissal of the claimant's suit and prayers a, b, c, e, and f.

c) Costs of the suit.

d) Any other or further relief the Honourable Court may deem fit to grant.

The reply to response was filed on 12.04.2016.

The respondent initially employed the claimant as a cook or chef and houseboy effective 05.05.2006. At the time of termination, the claimant was paid Kshs.15,000.00 per month, payable at mid month in cash and end month at the bank and in equal instalments. The employment contract was concluded orally. The claimant worked from 6.30am to 10.00pm. He prepared the respondent's breakfast at 6.30am, cleaned the bedrooms, did lunch, cleaned utensils, did dinner after 6.00pm and cleaned up to 10.00pm. The respondent provided the claimant with housing accommodation. The claimant worked through holidays for 7 days a week and on Sundays he reported at work at 5.00am. The claimant testified that the parties had agreed on a monthly pay.

On 20.02.2015 the claimant reported on duty and after doing the breakfast he proceeded to clean the rooms. The secretary to the Father-in-Charge summoned the claimant. The Father-in-Charge at that time was Father Joseph Muroki. The claimant went to him and the Father gave the claimant a cheque of Kshs.15,000.00. It was pay for February 2015. Father Joseph Muroki then told the claimant that the claimant was to leave employment because the claimant's employment had come to an end. The claimant was not given the reason for the termination. The claimant left employment that day at about 3.00pm.

The claimant reported a dispute at the labour office but the respondent declined to attend the conciliation proceedings. The claimant then decided to file the present suit. During the cross examination the claimant testified that on the date of the termination there was an incoming Father-in-Charge who decided to terminate the claimant's employment because the new Father had his own cook. The claimant admitted signing on 01.07.2012 the contract of employment which was effective 01.07.2009 for a period of 3 years but prior to that contract there had been no written contract. The claimant also admitted that he had signed on 03.07.2012 the gratuity payment agreement acknowledging the payment of Kshs.21,000.00 in cash for gratuity for the period 01.07.2009 and 30.06.2012. That agreement of 03.07.2012 stated that the claimant of his own accord was willing to renew his contract for another period of three years with new terms as would be agreed and further that with the payment as was made the claimant had nothing else to demand from the parish as per the parties' agreement.

The court has considered the pleadings, the documents on record, the claimant's evidence and the submissions. The court makes the following findings on the pertinent issues for determination in the suit:

- 1) In view of the gratuity payment agreement of 03.07.2012, the court finds that the parties by agreement made a genuine and final settlement between themselves with respect to all the claimant's previous service as of that date and the claimant's claims and prayers with respect to the period prior to 03.07.2012 will accordingly collapse as the same are not justified.
- 2) By reason of the gratuity payment agreement of 03.07.2012, the parties renewed the contract of employment which was effective 01.07.2009 and having lapsed on or about 03.07.2012. In absence of agreed new terms of service, the court returns that the terms in the lapsed but renewed contract applied to the claimant's service from 03.07.2012 until his termination on 20.02.2015 (the three years of the contract being scheduled to lapse on or about 03.07.2015)
- 3) The court returns that taking into account the claimant's testimony and the claimant's bank statement on record, at termination the claimant was paid Kshs.15,000.00 per month.
- 4) The claimant's long unbroken service of about 9 years was terminated abruptly on 20.02.2015. The reason given for that termination was that the incoming Father-In-Charge had to employ his own person in place of the claimant. The court finds that such was an invalid reason for terminating the claimant's employment because it was a reason falling outside the contractual terms and conditions as had been agreed between the parties. The court finds that the reason was not valid and

the termination was unfair under section 43 of the Employment Act, 2007. Even if the termination were to be treated as a redundancy in view of the personalised services the claimant provided and in view of the change of the office holder the claimant served, the court returns that the respondent failed to comply with the provisions of section 40 of the Act on redundancy so that in that event, the termination was unfair. The claimant wished to continue in employment, he had a long clean record of service and the claimant did not contribute to his termination in any manner. The court awards him 12 months' salaries under section 49(1) (c) at Kshs.15,000.00 per month making **Kshs.180,000.00** for the unfair termination.

5) The claimant is awarded **Kshs.15,000.00** being a month's pay in lieu of the last annual leave that would be or was due but the claimant could not access the same by reason of the termination which frustrated his opportunity to apply for the same. The leave due and not taken for the rest of the contractual term of service is deemed to have been forfeited in terms of clause 6(v) of the contract as there was no evidence that the claimant applied for the same and failed to take it at the instance of the respondent's written request as was agreed between the parties.

6) The claimant is awarded **Kshs.15,000.00** being one month pay in lieu of the termination notice under clause 9 of the contract.

7) The claimant confirmed that he was provided housing accommodation by the respondent and the claim and prayer on house allowances will fail.

8) The respondent contravened the claimant's statutory right to NSSF dues throughout the claimant's employment of 9 years and the respondent is strictly liable, for breach of the statutory obligation, to pay the claimant **Kshs.43,200.00** as prayed for.

9) The parties agreed on the working hours under clause 3 of the contract and further agreed that the claimant would be requested and would accept to work outside normal working hours at no extra pay. Accordingly, the claimant's prayers on overtime and holidays will fail. On the prayer for severance pay the court considers that the parties had agreed upon a gratuity at one month salary for each year served. The claimant had served the last term of 3 years less the remaining about 5 months which were frustrated by the respondent's unfair termination of the contract. Taking all the circumstances of the case into account, the court awards the claimant **Kshs.45,000.00** in gratuity being 3 months' pay in view of the service effective 03.07.2012.

The claimant is entitled to a certificate of service for the period 2006 to 20.02.2015.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.
- b) The respondent to pay the claimant a sum of **Kshs.298,200.00** by 01.09.2016 failing interest to be payable thereon at court rates from the date of the judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 22nd July, 2016.

BYRAM ONGAYA

JUDGE