



**REPUBLIC OF KENYA**

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

**CAUSE NO. 190 OF 2015 CONSOLIDATED WITH CAUSES 192 AND 193 BOTH OF 2015**

**J M M.....1<sup>ST</sup> CLAIMANT**

**J N G.....2<sup>ND</sup> CLAIMANT**

**P M W.....3<sup>RD</sup> CLAIMANT**

**-VERSUS-**

**THE REGISTERED TRUSTEES OF THE ANGLICAN**

**CHURCH OF KENYA.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> September, 2016)**

**JUDGMENT**

The claimants are at all material times devoted as ministers of the christian religion designated as Reverend in the Anglican Church of Kenya. The claimants filed their respective memoranda of claims on 30.10.2015, 03.11.2015, and 30.10.2015 respectively and through Wonge Maina & Onsare Partners Advocates. The amended memorandum of claim was filed for each claimant on 11.11.2015 and each claimant prayed for judgment against the respondent for:

- (a) Reinstatement as a Reverend in the Anglican Church of Kenya.
- (b) Payment of all accrued salary arrears since the date of suspension until determination of this suit.
- (c) General damages for slander and libel.
- (d) Aggravated and exemplary damages.
- (e) Interest on the above at court rates.
- (f) Compensation for psychological trauma caused by sudden and unexpected suspension of employment without any just cause at all.
- (9) Costs of the suit.

In each of the suits as separately filed for the claimants, the respondent filed the response to the claim and then the amended response to the claim through Ochieng', Onyango, Kibet & Ohaga Advocates. In each

of the cases the respondent prayed that the memorandum of claim be dismissed with costs.

On the date scheduled for the hearing the respondent and the respondent's advocates failed to attend and the claimants testified to support their respective cases and filed their respective final submissions. Subsequently, the respondent applied and by consent the cases were reopened for cross examination of the claimants and for that purpose and subsequent proceedings, the cases were consolidated. The respondent did not call witnesses, filed final submissions and the claimants filed further final submissions.

The claimants are devoted Christians with membership in the Anglican Church of Kenya and they each testified that by reason of their deep faith, the church identified each of them at diverse times to study the gospel as per the faith and beliefs of the church. Upon successful completion of the study and training, each claimant executed the oath of canonical obedience. By that oath, each claimant took an oath swearing that by Almighty God, he would pay due and canonical obedience to the Lord Bishop of [particulars withheld] and his successor in all things lawful and honest. Further, by that oath each claimant declared the consent to be bound by the constitution, laws and regulations of the diocese and the enactments in operation or to be enacted by the Diocesan Synod or which may have full effect in the Diocese. Further and by that oath each claimant undertook to accept and to submit to any sentence which may at any time be passed upon the claimant, after due examination by any court acknowledged by the Diocesan Synod for the trial of clergyman, saving all rights of appeal allowed by the said Synod.

Each of the claimants, on diverse dates, made a declaration of assent for the purpose of being ordained as deacon and then as a Reverend in the Diocese of [particulars withheld] and assenting to the 39 Articles of Religion and to the Book of Common Prayer and the Ordering of Bishops, Priests and Deacons. The declaration further stated thus, **“ I believe in the Doctrine of the Anglican Church as therein set forth, to be agreeable to the Word of God, and in Public prayer and the Administration of the Sacraments I will use the form in the said Book prescribed, and none other, except so far as shall be ordered by lawful authority.”**

Each of the claimants was issued by the Lord Bishop of [particulars withheld] a licence to officiate as Deacon and then as Reverend at designated Parish. By that licence each claimant was appointed by the Bishop to serve within the a Parish or other jurisdiction within the Diocese thus, **“ ...and to which you are appointed by us, or within any other PARISH within our Diocese and Jurisdiction to which you shall from time to time be appointed and removed with our written consent, in reading the Common Prayer and in performing all ecclesiastical duties belonging to the said office according to the form prescribed and none other except so far as shall be ordered by lawful authority and also to preach the word of God...”** The licence stated that the appointment was subject to each of the claimant having satisfied the Bishop of having been admitted to Holy Orders and also having taken before the Bishop the oaths and subscribed to the declarations which are required by law to be made, subscribed and taken; obviously referring to the declaration of assent and oath of canonical obedience referred to earlier in this judgment.

At material times the Bishop had deployed the 1<sup>st</sup> claimant effective 01.01.2015 to serve at ACK St. [particulars withheld] Parish, [particulars withheld] as the Reverend and the Vicar in charge. The 1<sup>st</sup> claimant's gross monthly pay was Kshs.16, 069.00 as per June 2015 payslip plus travel allowance of Kshs. 4, 200. His service as a Reverend had commenced from July 2013. By a telephone call on 20.08.2015 the 1<sup>st</sup> claimant was summoned to meet the Bishop on 21.08.2015 the scheduled venue being the ACK Guest House, Nyeri Town. The 1<sup>st</sup> claimant arrived at the venue at 8.00am but waited together with 3 other priests until 3.00pm when they were driven to the Diocesan offices. The 1<sup>st</sup> claimant was summoned to a room where Archdeacons and Church elders were in a meeting together with the Diocesan Chancellor. The Chairperson of the meeting one Cannon G informed the 1<sup>st</sup> claimant that they were investigating Venerable J N G (the 2<sup>nd</sup> claimant) on allegations of the 2<sup>nd</sup> claimant's involvement in homosexuality. The meeting asked the 1<sup>st</sup> claimant to explain his close association and relationship with the 2<sup>nd</sup> claimant. The meeting told the 1<sup>st</sup> claimant that he visited the 2<sup>nd</sup> claimant frequently and being close to the 2<sup>nd</sup> claimant the meeting took the view that it was possible that the 1<sup>st</sup> claimant was involved

in homosexuality. That it was the meeting's position that there was a group of persons involved in homosexuality and that the 1<sup>st</sup> claimant was one of those persons. The 1<sup>st</sup> claimant explained to the meeting that the 2<sup>nd</sup> claimant was his friend; he visited him frequently but denied involvement in homosexuality. The meeting told the 1<sup>st</sup> claimant to leave the meeting and to wait for the Bishop. The 1<sup>st</sup> claimant waited till 9.00pm and when the Bishop arrived, four priests including the 1<sup>st</sup> claimant were summoned and the Bishop told them that they had been summoned as witnesses against the 2<sup>nd</sup> claimant. The four priests were told to collect warning letters on 25.08.2015 which was issued as scheduled and the four priests were warned not to associate with the 2<sup>nd</sup> claimant as per the warning letter. The letter addressed to the 1<sup>st</sup> claimant concluded that the 1<sup>st</sup> claimant was given a benefit of doubt and seriously warned that if the association with the 2<sup>nd</sup> claimant persisted or the suspicion continued, the church would definitely remove the 1<sup>st</sup> claimant as clergy or student of the church.

By telephone on 28.08.2015 the claimant was summoned to meet the Bishop on 29.08.2015 at 8.00am. He attended as summoned and was taken to the meeting at the Hall and the chairman like before was Canon G. The chairman asked the 1<sup>st</sup> claimant to give further information about his association with the 2<sup>nd</sup> claimant and the 1<sup>st</sup> claimant replied that he knew only about the friendship and the congregation. The meeting which the 1<sup>st</sup> claimant described as a tribunal of about 6 persons told the 1<sup>st</sup> claimant to go and await the outcome. By telephone on 30.08.2016 the claimant was summoned to meet the Bishop on 31.08.2016. The 1<sup>st</sup> claimant attended as scheduled and the Bishop's secretary delivered to him the suspension letter dated 30.08.2016. The letter referred to the warning letter of 22.08.2015 and stated that the 1<sup>st</sup> claimant's name had been adversely mentioned by witnesses as one of the persons who had been involved in the practice of homosexuality. The letter further stated that the pastoral board was carrying out further investigations and the 1<sup>st</sup> claimant's name had featured at every stage. The letter then concluded thus, **"...In light of the aforementioned we are suspending you from your ministerial functions and also withdrawing your licence to officiate to allow the investigation move to a conclusive position. Meanwhile we advise you to take your time to reflect on your call in the Ministry of the Gospel and your stand towards Sound Doctrine and the Truth as per the Word of God. Organise the handing over of the parish with your Rural Dean Rev. S K before 1<sup>st</sup> September 2015. Yours in Christ Service,"** The letter was signed by The Right Reverend JK [particulars withheld].

The 1<sup>st</sup> claimant testified that during that week on Thursday 03.09.2015 he heard Bishop K on Inooro FM Radio saying that the Diocese had fired priests for being homosexuals and the priests were at liberty to appeal. The 1<sup>st</sup> claimant appealed by the letter dated 24.09.2015 as per Canon XXI Rule 1 but had not received a response. The 1<sup>st</sup> claimant's grounds of appeal were as follows:

- (a) The 1<sup>st</sup> claimant was not given written particulars of allegations as provided for in Canon XXI Rule 1 of the Anglican Church of Kenya Constitution.
- (b) The 1<sup>st</sup> claimant was not given an opportunity to prepare his response as per Canon XVIII Rule 3 of the church's constitution.
- (c) The 1<sup>st</sup> claimant was not given an opportunity to be represented by an advocate of his choice as provided for in Canon XVI Rule 5.
- (d) The 1<sup>st</sup> claimant was not given a written record of the proceedings of the tribunal as per Canon XVI 10 of the constitution.
- (e) The 1<sup>st</sup> claimant was not given a copy of the judgment reached by the tribunal and the reasons for arriving at the judgment by each member of the tribunal as provided in Canon XVIII Rule 6.
- (f) The lawful punishment for a misconduct of sexual immorality under the church's constitution is suspension for a term not exceeding 3 years or deprivation or deportation and the sentence imposed

by the church was therefore illegal or in contravention of the constitution of the church.

(g) It was unfair and illegal for the church to broadcast in electronic and print media matters the church knew not to be true or ought to have known were not true thereby subjecting the claimant and his family to disrepute and public scorn.

The 3<sup>rd</sup> claimant like the 1<sup>st</sup> claimant was summoned by telephone on 20.08.2015 to meet the Bishop on 21.08.2015. On 21.08.2015 he appeared before the tribunal. The tribunal informed him about investigations into homosexuality allegations against the 2<sup>nd</sup> claimant and asked the 2<sup>nd</sup> claimant to explain about his relationship with the 2<sup>nd</sup> claimant. The 3<sup>rd</sup> claimant told the tribunal that he knew nothing about the allegations and that during the 3<sup>rd</sup> claimant's practical priesthood sessions he had stayed with the 2<sup>nd</sup> claimant under the same roof from July 2012 to September 2012 during which time the 2<sup>nd</sup> claimant's family had also been present living under the same one roof. The 3<sup>rd</sup> claimant told the tribunal that the 2<sup>nd</sup> claimant was his mentor and that he owed a lot to the 2<sup>nd</sup> claimant as an excellent mentor. That he confided in him as a friend and that he respected him as a father because he was the age of the 3<sup>rd</sup> claimant's father. The tribunal then alleged that the 2<sup>nd</sup> claimant had gone to [particulars withheld] and spent nights with the 3<sup>rd</sup> claimant at that Parish. The 3<sup>rd</sup> claimant then denied that allegation and told the tribunal that for the over one year the 3<sup>rd</sup> claimant had served at the [particulars withheld], the 2<sup>nd</sup> claimant had never visited or gone to that Parish. After the hearing the 3<sup>rd</sup> claimant was told to wait to be seen by the Bishop. At 9.00pm the Bishop summoned the 3<sup>rd</sup> claimant to his office and told him that he was a witness and he was to return on 25.08.2015 to collect a warning letter. The warning letter dated 22.08.2015 was delivered as scheduled signed by the Bishop and whose contents were similar to those in the warning letter addressed to the 1<sup>st</sup> claimant. Subsequently the 3<sup>rd</sup> claimant received a suspension letter dated 31.08.2015 with contents similar to the suspension letter delivered to the 1<sup>st</sup> claimant and set out earlier in this judgment. Inooro FM Radio and the print media published the story. It was the 3<sup>rd</sup> claimant's case that homosexuality was not acceptable in church and in African culture and that his reputation had seriously suffered. Priesthood was his lifelong calling and he had nowhere to run to or to hide in view of adverse public comments about him. The suspension was indefinite and a decision that he remains out of the service in the church forever so that he considered himself terminated. After appeal he received no response. He had served for only one year and he had a long way to go and he pleaded that the court should protect him as a young priest who had invested all his life in priesthood and had great expectations.

The 2<sup>nd</sup> claimant was ordained as a Reverend on 24.08.1996 and has had a long service with the Anglican Church of Kenya. At the material time he held several roles in the church including as Vicar for St. [particulars withheld] Parish, Archdeacon for [particulars withheld] Archdeaconry, Vice Chairman of the [particulars withheld] Diocesan Synod, and Chairman of the [particulars withheld] Diocese Bishop's Examining Chaplain which qualifies candidates to join Padre Service. Throughout his service he was paid a monthly salary the last being Kshs. 31, 270 (Kshs. 24, 770.00 as basic pay and travel allowance of 6, 500.00 per month.). Bishop K telephoned the 2<sup>nd</sup> claimant on 20.08.2015 and the Bishop invited the claimant to a meeting on 21.08.2015. The 2<sup>nd</sup> claimant arrived before 9.00am on the scheduled date. He joined other Archdeacons and church elders at a meeting hall because the Bishop was not at his office as at time the 3<sup>rd</sup> claimant arrived at the office. The meeting was essentially the same tribunal chaired by Canon G and the 2<sup>nd</sup> claimant was told he was the subject of the agenda and he had to leave the meeting for 10 minutes as the meeting was about to start.

The 2<sup>nd</sup> claimant was summoned back to the meeting at about 11.00am or 12.00noon. The setting was like an interview panel and the 2<sup>nd</sup> claimant thought he was due for promotion or that there was some problem. The chairman informed the 2<sup>nd</sup> claimant that the tribunal had been appointed by the Bishop about the claimant and formal introductions were done. The 2<sup>nd</sup> claimant was informed about allegations by one E K I that in Mid-December 2013 the said I went to the claimant's residence at the church and the said I and the 2<sup>nd</sup> claimant used the same bed and at night the 2<sup>nd</sup> claimant engaged in homosexuality.

The tribunal chairman advised the 2<sup>nd</sup> claimant that if the claimant admitted the allegations the matter would not leave the room and the Bishop would deal with it amicably. The 2<sup>nd</sup> claimant told the tribunal that he would not admit to something he did not know about. The Diocesan Chancellor then intervened and advised that if the 2<sup>nd</sup> claimant admitted then the Bishop would be informed and the Bishop would decide the 2<sup>nd</sup> claimant's fate but if he denied, then witnesses would be called but the 2<sup>nd</sup> claimant would not be allowed to call witnesses in which event, the fate of the 2<sup>nd</sup> claimant's service as a priest would be decided upon by the tribunal. The 2<sup>nd</sup> claimant remained adamant that he was not going to admit matters he did not know about. The chairman then ruled that one witness would be called and the said E K I was called into the tribunal proceedings.

The said I introduced himself and said he knew the 2<sup>nd</sup> claimant because sometimes back he had worked under the 2<sup>nd</sup> claimant. He told the tribunal that in December 2013 he went to 2<sup>nd</sup> claimant's house and spend a night and from 11.00pm to 3.00am the 2<sup>nd</sup> claimant and the said I engaged in homosexuality. I then told the tribunal that the homosexuality between the said I and the 2<sup>nd</sup> claimant then became a routine. The 2<sup>nd</sup> claimant testified that I'S testimony greatly shocked him. The tribunal gave the 2<sup>nd</sup> claimant an opportunity to cross examine the said I . The 2<sup>nd</sup> claimant testified in court that he recognised the said I as a youthful Evangelist of 20 to 21 years who worked with the 2<sup>nd</sup> claimant in November, December, 2013 and January 2014 after which he left to join college and his salary was paid later. He had left in February 2014. The next time the 2<sup>nd</sup> claimant saw the said I was at the tribunal proceedings.

In cross examination at the tribunal, the 2<sup>nd</sup> claimant asked I why he had not reported the allegations since February 2014 and the tribunal then interjected advising the 2<sup>nd</sup> claimant not to lead I at all. The 2<sup>nd</sup> claimant was then told to leave the meeting. It was about 1.00pm and the 2<sup>nd</sup> claimant waited until about 9.30pm when he was led to Bishop Kagunda's office. The Bishop told the 2<sup>nd</sup> claimant that he had been found guilty by the tribunal and that he was required to handover the following day. He told the Bishop he would comply with handover as directed and then asked the Bishop why he had been kept the whole day without food. The Bishop proceeded to give the 2<sup>nd</sup> claimant Kshs.1, 000.00 for lunch but the 2<sup>nd</sup> claimant told the Bishop that he would use the cash for fuel. The 2<sup>nd</sup> claimant testified that he thanked the Bishop for the service in the church and he had no difficulty in his conscience but having served at the Parish for 5 years he requested the Bishop to allow him some time to move out. The bishop agreed that time would be allowed for the claimant to leave the house and the meeting ended at about 10.00am. On 22.08.2013, the 2<sup>nd</sup> claimant received the letter dated 22.08.2015 signed by the Bishop. The letter stated as follows:

**“Dear J,**

**RE: CANCELLATION OF YOUR LICENCE TO OFFICIATE**

**I greet you in the Name of our Lord Jesus Christ.**

**A complain was received by me with regard to you having engaged in a sexually immoral conduct in that it was alleged that you sexually molested one of your young evangelists who was working with you in your parish in or around the months of December 2013 to March 2014.**

**In exercise of my powers under Canon XV of our constitution, I appointed a tribunal to look at the said complaint. I am now informed that the said tribunal sat on the 21<sup>st</sup> day of August 2015, where you were present as well as your accuser and all parties were heard.**

**The tribunal proceeded and found you guilty of the said conduct and a sentence of deposition was meted out in accordance with Canon XX 1 (iii) of our constitution. I am now writing to advice and direct you that consequent upon the said sentence, you are hereby forth with deprived and suspended from all church ministerial functions in the Diocese of [particulars**

**withheld] and others in the Anglican Church of Kenya.**

**I have accordingly withdrawn your licence to officiate. Please proceed and hand over the parish to the church elders and any church property in your possession.**

**I wish you well and God's blessings.**

**Signed**

**Rt. Rev. J M K**

**Diocesan Bishop**

**CC: Most Rev'd Dr. E W**

**Archbishop of Anglican Church of Kenya**

**All ACK Bishops**

**Diocesan Chancellor**

**Administrative Secretary"**

The 2<sup>nd</sup> claimant appealed against the cancellation of the licence to officiate by his advocate's letter dated 24.09.2015. The grounds of the appeal were similar to the 1<sup>st</sup> claimant's grounds of appeal. The appeal was never decided and no reply has been received.

The 2<sup>nd</sup> claimant testified that he handed over and went to his home. Some mason assisting him at his home came and told him that the story about his removal from priesthood on account of homosexuality had been published on radio and the print media and the 2<sup>nd</sup> claimant underwent extreme pain.

The 2<sup>nd</sup> claimant testified that he had worked with the church for about 18 years and by the decision to remove him he had lost his pension under the contributory priests' pension fund. It was his case that the removal and its publication had adversely affected his reputation and that of his family as he had been defamed. He further testified that he was not a homosexual and it was due to church politics that he had been removed. In particular in 2014 he had contested against Bishop Kagunda for the position of the Bishop of [particulars withheld] Diocese and he believed that the rivalry had led to his current predicament.

The 1<sup>st</sup> issue for determination is whether the respondent, the Registered Trustee of the Anglican Church of Kenya is the proper defendant in this suit as sued as the claimants' employer. The respondent has pleaded that the Church Commissioners of Kenya served with the suit papers in this regard is the only trust registered with reference to the Anglican Church of Kenya and as served maintains that it is not a proper party to the proceedings. The respondent has pleaded that it is a company limited by guarantee not having a share capital and it is a trust that holds all funds for the Anglican church of Kenya and is purely an investment arm of the church run by a Board of Governors. It denies that it ordains, appoints or transfers clergy of the Anglican Church of Kenya; it does not employ staff of the church, and does not exercise disciplinary control over the staff of the Church.

For the claimants it has been submitted that the respondent and the Anglican Church of Kenya has not declared the person in law who is responsible for the liabilities related to human resource functions and in **Grace Kathure Mugwika-Versus- Registered Trustees of the Anglican Church of Kenya (A.C.K) [2015]eKLR** the court found the respondent liable for the unfair termination of the claimant.

The court has considered the material on record and there is no doubt that within the statutes of the

Anglican Church of Kenya, the respondent is the only recognised person in law that is responsible for the funds of the church and the court returns that the respondent is the proper party in a suit like the present suits where the claimants are seeking pecuniary reliefs and which can only be satisfied by the respondent on behalf of the church. In making that finding the court follows the holding in the cases cited for the respondent namely Apex Finance International Limited & Another –Versus- Kenya Anti-Corruption Commission [2012]eKLR, Jan Bolden Nielsen –Versus- Herman Philipus Steyn & 2Others [2012]eKLR, Amon –Versus- Raphel Tuck & Sons Ltd (1956) 1 ALL ER 273, and Football Kenya Federation –Versus- Kenyan Priemier League Limited and 4 Others[2015]eKLR. In those cases it was consistently held that a proper party to a suit must be one upon whom rights and obligations arising from the cause of action attach and in whose absence no effective decree or order can be passed in a proceeding by the court. To answer the 1<sup>st</sup> issue for determination, the court returns that the respondent is the proper party to the suit in this matter where the claimants are seeking a remedy against the Anglican Church of Kenya which otherwise is an unincorporated association. The court returns that the existence and establishment of the respondent by the church is an ample provision by the Anglican Church of Kenya to avoid a representative suit being brought against some of its members or officials as would be the case against an unincorporated association. Article XVII of the Constitution of the Anglican Church of Kenya vests all property of the church in the respondent and the court returns that there would be no effective decree or order passed by the court in the present proceedings binding upon the church except against the named respondent. The respondent is therefore the proper party to have been sued in the present proceedings.

To answer the 2<sup>nd</sup> issue for determination, the court returns that the claimants were employed by the Anglican Church of Kenya and deployed to their respective stations of service. Each of the claimants was an employee of the Church within the framework of the church statutes namely the Constitution of the Anglican Church of Kenya and the Constitution of the Anglican Church of Kenya, Diocese of [particulars withheld]. In particular the court finds that the claimants were employees within the meaning under the Employment Act, 2007 because each was paid a salary on monthly basis and was bound by the provisions of the respondent's regulations, Holy Orders, Oaths taken, declarations subscribed to and the Church's Diocesan and Provincial constitutions. The court particularly finds that by the licence to officiate, the Bishop of [particulars withheld] in exercise of the legitimate authority conferred upon him under the statutes of the Church appointed each of the claimants to their respective positions in the Church and deployed them accordingly under his hand and authority as duly conferred.

The 3<sup>rd</sup> issue for determination is whether the claimants were terminated from employment. The court has found that by the licence to officiate each of the claimants was duly appointed by the Bishop to the respective position held because each of the claimants had satisfied the Bishop and the Diocesan Chancellor to qualify for such appointment by reason of the exhibited claimants' oath of canonical obedience; the declaration of assent to the 39 Articles of Religion, and the Book of Common Prayer, and the Ordering of Bishops, Priests and Deacons; believe in the Doctrine of the Anglican Church to be agreeable to the Word of God, and in public prayer and the administration of Sacraments to use the form in the said Book of Common Prayer, except so far as shall be ordered by lawful authority; and satisfaction by the claimants for admission to Holy Orders. The court returns that each of the claimants was therefore duly appointed in the service of the church, the Anglican Church of Kenya.

The 4<sup>th</sup> issue for determination is whether the claimant's employment was terminated. The court has found that the employment was effected and founded upon the licence to officiate issued by the Bishop in favour of each of the claimants. The court holds that the licence to officiate constituted the instrument of the employment of each of the claimants into the service of the church. For the 1<sup>st</sup> and 3<sup>rd</sup> claimants the Bishop withdrew the licence over and above an indefinite suspension from the ministerial functions. For the 2<sup>nd</sup> claimant the licence to officiate was withdrawn by the Bishop and the claimant was also suspended from all ministerial functions and sentences of deposition as well as deprivation were imposed. The court returns that the indefinite suspensions and the withdrawal of the respective licences to officiate against all the claimants, as well as the sentences of deposition and deprivation (against the 2<sup>nd</sup> claimant) amounted to termination of the claimants' respective contracts of employment with the church.

The 5<sup>th</sup> issue for determination is whether the termination was unfair. First, the court finds that each of the claimants was not accorded a notice of the intended termination as was envisaged in section 41 of the Employment Act, 2007. The claimants appeared before the disciplinary tribunal for a disciplinary hearing without notice of the allegations and the intended removal or withdrawal of their respective licences to officiate. For the serious offence of sexual immorality namely homosexuality, Canon XVI (2) envisages a charge in a criminal court and the findings of the criminal court would therefore be conclusive as provided in that Canon. Canon XVI (3) sets out strict timelines on when the proceedings flowing from the criminal convictions should be tabled before the disciplinary tribunal. In absence of a criminal proceedings and conviction against any of the claimants, the court returns that the respondent failed to establish a valid reason for withdrawing the claimants' licences to officiate and therefore terminating the claimants' employment in the service of the church. It is clear that there was no written charge against each of the claimants as envisaged in Canon XVI (4). As lamented by the claimants, they were not afforded a chance for legal representation as envisaged in Canon XVI (5). It has not been shown that the witness at the tribunal hearing one I was subjected to the mandatory affirmative answer to the question in Canon XVI (6) thus, **“Do you promise, in the presence of Almighty God, that you will speak the truth, the whole truth, and nothing but the truth, whether in the declaration which you shall make, or in the answers which you are about to give?”** In taking into account the foregoing findings, the court returns that the disciplinary procedure as set out by the Anglican Church of Kenya was not followed and adhered to in the proceedings leading to the withdrawal of the claimants' licences to officiate and therefore the termination of their employment by the church.

Section 43 (1) of the Employment Act, 2007 and section 47 (5), the burden of proving that the reason for termination was valid and justifying the grounds for the termination of employment rested with the respondent and in absence of any evidence or a conviction for the alleged offence of sexual immorality or practicing homosexuality, the court returns that the respondent failed to discharge the stated statutory evidential burden. On the other hand, the claimants have by evidence, as required under section 47 (5), showed that the termination was unfair because the procedure in the cited provisions of Canon XVI and section 41 of the Act was not followed and the reason for termination was invalid as it was not established as envisaged in sections 43(1) and 47 (5) of the Act.

In finding that the termination was unfair, the court has elaborately revisited the provisions of the Constitution of the Anglican Church of Kenya together with the Canons of the church as enacted under that constitution. Canon XVI has detailed provisions on disciplinary proceedings within the church. Canon XVI (1) deals with charges or accusations that may be presented for trial against any Bishop, Priest, Deacon or Layman of the church. Sexual Immorality is listed at (i) as one of possible charges or accusations. The language applied is the language which in our secular courts, as by law established, apply in criminal proceedings. The court therefore finds that there is no doubt that in the trial before the internal institutions or tribunals of the Church, the expected standards are the standards and procedures applied in the secular courts of law in Kenya. Thus, Canon XVI (15) provides thus, “ Save as may be herein otherwise provided the rules relating to procedure and evidence shall be those governing Criminal Trials in Kenya.” In the case that the claimants were required to answer, the court returns that they were not afforded the safeguards of a criminal trial as provided for in Article 50 of the Constitution of Kenya, 2010 on fair hearing. Some of the safeguards were expressly provided for in Canon XVI (4) to (12) and the same were not accorded or availed to the claimants including a written charge with clear particulars; right to legal representation; evidence to be taken only from sworn witnesses; public hearing except where clear reason exist and the accused consents to a hearing which is not in public; appointment of assessors to assist the tribunal; and making of a written sentence. The court finds that there was no evidence that the safeguards were complied with.

Canon XVIII is elaborate on the trial of priests and deacons and it applied to the claimants who were Reverends performing functions of deacons and priests. Indeed, “priest” in Article 1(26) of the Constitution of the Anglican Church of Kenya, **“...is a person who has been ordained by a Bishop after serving as a Deacon successfully. A priest has a right to perform pastoral and sacramental duties if licensed by a Bishop so to do.”** The court finds that the claimants were priests and Canon XVIII fully applied to them. The specific safeguard under Canon XVIII (1) is that a charge against a priest or deacon is, mandatorily so, preferred by a priest licensed in the church or the church wardens of the Parish in

which the accused is licensed or by 10 or more communicants of 24 years of age upwards, all of the Parish in which the accused is licensed or resides; or the Bishop may himself, if he shall see fit, order proceedings to be commenced against any clergyman whose conduct he believes to have given just cause for scandal or offence, and in such a case it shall be sufficient for one presenter appointed by the Bishop to deliver the articles of presentment. The court finds that there was no evidence that the provision had been complied with and the manner the proceedings were initiated or commenced being at large, it remains suspect that the proceedings were genuine in view of the unopposed evidence by the 2<sup>nd</sup> claimant that his predicament arose from the close rivalry between him and the Bishop during the elections for the Bishop of the [particulars withheld] Diocese.

Further, Canon XVIII (3) provides that the notice of intention to admit proceedings, containing a statement of the charge and a copy of the information upon which it is founded, shall be served upon the person accused, together with the names of those persons, if any, appointed as assessors, at least 30 days before the hearing of the case, which shall commence within 3 months of the date of admission of the articles of presentment. Canon XVIII (6) provides that the judgment and sentence must be by the majority of the members of the tribunal with each member having a right to state the grounds for his findings. The court returns that there was no evidence that the provisions were upheld and applied in the claimants' cases.

The court considers and finds that the effect of withdrawing or cancelling the claimants' respective licences to officiate and indefinitely suspending each one of the claimants from their respective ministerial functions effectively amounted to imposition of the sentence of **"degradation"** which under Canon XX (6) (e) on sentencing means the total removal from Holy Orders of the person on whom sentence is passed. Under Canon XX 5, no sentence of degradation shall come into effect until the Bishop shall have secured the consent of the Episcopal Synod which has the power to remit the sentence or to substitute for it at a lesser sentence. Article 1 (20) of the Constitution of the Anglican Church of Kenya defines **"Episcopal Synod"** thus, **"...means the Bishops of the Province, assembled as a body in accordance with this Constitution."** The court finds that the claimants and as testified by the 3<sup>rd</sup> claimant, after the impugned decisions, the claimant's had nowhere to hide, they had nowhere to run to, they had no place to swallow them, they were irreparably exposed, their lifelong investment to serve in the church was everlastingly ruined and nothing was left with them of their Christian service in the church. Such, in the opinion of the court, was a drastic decision that required the concurrence and review by the Episcopal Synod but which was not done in the claimant's case.

The court has considered that gay or homosexual within the context of sexual immorality as envisaged in Canon XVI 1(i) as read with Canon XV (15) must be understood within the provisions of the Penal Code Cap.63 Chapter XV on offences against morality and the relevant sections 162 and 163 on unnatural offences which provide as follows:

**"162. Any person who –**

- (a) has carnal knowledge of any person against the order of nature; or**
- (b) has carnal knowledge of an animal; or**
- (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:**

**Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if –**

- (i) the offence was committed without the consent of the person who was carnally known; or**
- (ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm,**

or by means of false representations as to the nature of the act.

**163. Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.”**

Thus, within the ingredients of the offence is “**carnal knowledge**” which requires establishment of sexual intercourse or as it were, penetration. Taking the material on record into account, such was not established against any of the claimants. In the circumstances, the court returns that the respondent at the time of removing the claimants or before a court of competent jurisdiction failed to establish the alleged sexual immorality, the alleged gay or homosexual act, against the claimants. Similarly, an attempt to commit such offences was not established at the time of the tribunal hearing or before a court with competent jurisdiction. Under Canon XV (2) it is contemplated and envisaged that a finding by a competent secular trial criminal court that any offence as provided under the Canon has been proved and the person convicted, then such conviction by the court would become conclusive and shall be sufficient proof that the accused has committed the offence except that the accused shall have the right of submitting fresh evidence (before the church’s tribunal) in support of his innocence. The court has considered that provision and finds that the church, and rightly so, considers that criminal liability should properly be determined by a secular court of law as provided in Article 50 (2) (d) thus, **“Every accused person has the right to a fair trial, which includes the right to a public trial before a court established under this Constitution.”** In that regard the court upholds its opinion in **David Nyamai and 7 Others –Versus- Del Monte Kenya Limited [2015]eKLR** thus, **“The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under section 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee’s conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee.”**

The court further upholds its opinion in disciplinary cases against employees where in the opinion of the employer there exist a criminal element as set out in the guiding applicable principles in the case of **Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru**, thus, **“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:**

**(a) Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant criminal justice agency.**

**(b) If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**

**(c) If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**

**(d) To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."**

In the present case, it has been shown that the church had elaborate provisions under the Canons providing that offences had to be decided in accordance with procedure and evidence governing criminal trials in Kenya. Such procedure and evidence included the right in Article 50 (2) (d) of the Constitution of Kenya, 2010. Under the doctrine of the supremacy of the Constitution as provided for in Article 2 of the Constitution of Kenya, 2010, by reason of Article 50 (2) (d) of the Constitution of Kenya, 2010 it was mandatory that the alleged offence as was intended or desired to be made against the claimants had to be proved in a public trial before a court established under the Constitution of Kenya, 2010. That did not happen as it was not done with respect to offences against morality or sexual morality as was unfairly levelled against the claimants. Accordingly the court is impelled to find that the reason for the removal of the claimants from priesthood was invalid as it was not genuine.

To answer the 5<sup>th</sup> issue for determination the court returns that the termination of the claimants' employment was unfair for want of a valid reason for the termination and for want of due procedure both under the constitution of the church and the canons and regulations made there under as well as the provisions of the Employment Act, 2007 as set out in this judgment.

The 6<sup>th</sup> issue for determination is whether the claimants are entitled to the remedies as prayed for.

The claimants have prayed for reinstatement. The court has considered that the claimants have invested all their youthful and indeed all their lives to be good members of the Anglican Church of Kenya in the excellent service of the church as Reverends or Ministers of the Gospel. All the material on record show that the claimants have not known any other vocation and they have taken detailed and conscious decisions to shape their respective destinies in the service of their Almighty God within their mastered faith of the Anglican Church of Kenya. The court has considered that the claimants did not in any manner contribute to their respective predicament of removal from employment by way of cancellation of their respective licences to officiate. The court has further considered the widely publicized manner in which the claimants were removed from office and the accompanying public stigma. The court has further looked for a bar to reinstatement and has not found one on record. In the circumstances, the court returns that each of the claimants is entitled to reinstatement to the respective position held in the church effective the date of the removal and to continue serving in the church with full benefits until the lawful termination of the employment. For that purpose each of the claimants shall report to the Lord Bishop of the Diocese of [particulars withheld], not later than 01.10.2016 at 0900Hrs for appropriate deployment. Accordingly, each of the claimants is entitled to payment of all accrued salary arrears, since the date of removal by way of suspension or cancellation or withdrawal of the licence to officiate, until determination of the suit and to continue earning full monthly salary and benefits until the date of the

lawful termination of the employment from the service of the church.

In view of the reinstatement effective sometimes in August 2015, the claimants are entitled to monthly pay (less lawful deductions up to the delivery of this judgment) and thereafter to continue in employment with full salary and benefits including agreed or statutory retirement benefits as there will be no break in the claimants' respective service. Accordingly, the 1<sup>st</sup> claimant is awarded **Kshs.224, 996.00** at Kshs.16, 069.00 per month for 14 months; the 2<sup>nd</sup> claimant **Kshs.437, 780.00** at Kshs.31, 270.00 per month; and the 3<sup>rd</sup> claimant **Kshs.219, 814.00** at Kshs.15, 701.00 per month.

The court has carefully reflected upon the prayer for compensation for psychological trauma caused by sudden and unexpected suspension of employment without any just cause at all. In the opinion of the court, psychological trauma is in the nature of a mental injury resulting from an event that interferes with an individual's normal ability to function. It includes such things as stress, depression, anxiety, post traumatic stress disorder and adjustment disorder. There is no doubt that after the unfair removal, taking into account the grave allegations of homosexuality against the claimants and the manner in which the removal and allegations were publicised by the church leadership, the claimants suffered serious psychological trauma. As testified by the 3<sup>rd</sup> claimant, the court finds that the claimants must have looked for a place to hide or something to swallow them but found none. There is no doubt that such suffering and pain on the part of the claimants was a direct consequence of their unfair removal by their employer and the employer's actions were in all unreasonable; the court finds that it was on the extreme employer's leadership and management action to treat the claimants in the manner they were treated. The court's opinion is that depending on the claimants' individual personal traits, individual personal circumstances, individual existing mental status, and individual work circumstances they find themselves their individual recovery will take a long time and will invariably be less than full.

The court has considered the provisions of the otherwise would be applicable Work Injury Benefits Act, 2007. The Act is the relevant legislation providing for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes. In section 1 the Act defines "**injury**" to mean a personal injury and includes the contracting of a scheduled disease. The kind of psychological injury the claimants have suffered arising directly from their employer's actions is not contemplated under the Act because psychological trauma or mental injury is not one of the scheduled personal injuries or scheduled diseases. Section 12 (3) (viii) of the Employment and Labour Relations Act, 2011 provides that in the exercise of its jurisdiction under the Act, the court shall have power to make any other appropriate relief as the court may deem fit to grant. Even after the reinstatement, the court has found that the claimants will thereafter and for a long time seek to heal from the arising psychological trauma and they will most likely heal to less a degree than full recovery. In view of the serious psychological trauma, the court awards each of the claimants **Kshs.2,000,000.00** as the court's considered appropriate compensation in that regard.

Submissions were not made for the claimants on the prayers for general damages for slander and libel; and aggravated and exemplary damages. The court returns that in absence of specific submissions in that regard, the prayers are deemed to have been abandoned.

Finally, the court has considered Article XXVI of the Constitution of the Anglican Church of Kenya. At Article XXVI 1(a) it is declared that the Church of Jesus Christ is a fellowship of love and mutual service under which the supreme law is the law of love. At Article XXVI 2(b) it is declared that the disciplinary action of the Church rests on the consents of its members and has nothing to do with the coercive jurisdiction of earthly courts, but, Christians like all others are subject to the law of the land in which they live and may claim neither exertion nor privilege in relation to such law of the land. At Article XXVI 2(c) brethren are discouraged from subjecting against one another to the secular courts of law and disputes should be settled by wise and experienced members within the fellowship. The parties to the suit are reminded of the cited guiding provisions of the constitution of the Church and it is the court's directive view that the parties will follow those provisions especially going forward to implement the final orders in this judgment and the Church giving support to the claimants, as far as possible, to recover from their excruciating predicament in this matter.

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

(a) Reinstatement with full pay and benefits to the respective position held in the church effective the date of the removal by way of indefinite suspension or withdrawal or cancellation of the licence to officiate and to continue serving in the church with full benefits until the lawful termination of the employment; as the decision as conveyed in the letter of suspension or withdrawal or cancellation of the licence to officiate is hereby set aside.

(b) For the purpose of order (a) above, each of the claimants shall report to the Lord Bishop of the Diocese of [particulars withheld], not later than 01.10.2016 at 0900Hrs, for appropriate deployment and assignment of Priesthood duties including performance of pastoral and sacramental duties as per the claimant's prevailing oath of canonical obedience, declaration of assent, and the licence to officiate.

(c) The respondent to pay the claimant all accrued salary arrears, since the date of removal by way of suspension or cancellation or withdrawal of the licence to officiate, and until the date of this judgment and thereafter to continue paying the claimant full monthly salary, allowances and all applicable benefits until the date of the lawful termination of the employment from the service of the church.

(d) In line with the foregoing orders and other findings by the court as set out in this judgment the respondent to pay the 1<sup>st</sup> claimant **Kshs.2, 224,996.00**, the 2<sup>nd</sup> claimant **Kshs.2, 437,780.00**, and the 3<sup>rd</sup> claimant **Kshs.2, 219,814.00** by 01.12.2016 failing interest at court rates to be payable thereon from the date of this judgment until the date of full payment.

(e) The respondent to pay each claimant's costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 9<sup>th</sup> September, 2016.**

**BYRAM ONGAYA**

**JUDGE**