



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 671 OF 2013**

**FELIX BARNABUS SHIKUTWA.....CLAIMANT**

*VERSUS*

**THE MINISTRY OF STATE FOR DEFENCE.....1<sup>ST</sup> RESPONDENT**

**GENERAL JEREMIAH KIANGA.....2<sup>ND</sup> RESPONDENT**

**LIEUTENANT GENERAL JACKSON TUWEI.....3<sup>RD</sup> RESPONDENT**

**COLONEL BISHOP ALFRED K. ROTICH.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

Mr. Mukele for claimant

M/S Chege for respondent

**JUDGMENT**

1. The claimant is a Catholic priest, Diocese of Kakamega ordained on 6<sup>th</sup> January 1996.
2. The claimant was seconded to the military in 2003 upon undergoing interviews and training. He was posted to the 12<sup>th</sup> battalion Thika as 1<sup>st</sup> uniformed chaplain. On 4<sup>th</sup> February 2003 he was commissioned as an officer. Claimant was transferred to 12<sup>th</sup> Engineering till the year 2006 and was nominated for peace keeping in Southern Sudan. The claimant stayed in the Republic of South Sudan for thirteen (13) months. Upon return from Sudan, claimant reported to Bishop Rotich the 4<sup>th</sup> defendant and proceeded on leave around 14<sup>th</sup> May 2008. Upon return from leave Bishop Rotich gave the claimant termination instructions dated 30<sup>th</sup> June 2008. Claimant produced termination of commission letter marked exhibit 4. The letter does not provide reasons for the termination. The claimant was not taken through any disciplinary hearing.
3. On 30<sup>th</sup> September 2008, claimant wrote a redress application. It was responded to on 24<sup>th</sup> November 2008. The response stated that the redress was not approved and the claimant was advised to go back to his diocese of Kakamega for deployment.

4. The claimant complained to the public complaints committee and the committee wrote to the Provincial Secretary Defence on 9<sup>th</sup> November 2008. The Principal Secretary responded to the effect that the claimant's commission was terminated for conducting shoddy deals whilst in Sudan.

5. The claimant earned a gross salary of Kshs.81,652 per the payslip marked exhibit 10.

6. The claimant seeks various reliefs including:

i. compensation for wrongful termination of commission;

ii. house allowance underpayment in the sum of Kshs.56,000;

iii. unpaid annual leave for five (5) years Kshs.275,000;

iv. erroneous house rent deductions kshs.14,000;

v. gratuity for five (5) years and one hundred eighty six (186) days Kshs.54,272;

vi. costs of the suit set out in his witness statement.

7. The claimant has pleaded particulars of unlawfulness, malice and ill-will in the plaint filed on 24<sup>th</sup> September 2009 and in his oral testimony before court.

8. The claimant submitted further particulars of his claim dated 27<sup>th</sup> July 2014 and filed on 28<sup>th</sup> July 2014. He told the court that he is still a priest but without any work. The diocese awaits the court's decision. He testified that he was solely dependent on his family.

9. The claimant was subjected to close cross examination by counsel for the respondent. He denied that he had been recalled by the Bishop and stated that he had no misunderstanding with the Bishop of Kakamega. He said that even canon law has human rights he needed to be fairly treated and be informed the reasons for discontinuation of his commission, since he was a military officer.

10. The claimant said that his terminal benefits were used to pay-off outstanding loans but he was not furnished with the details. He concluded that he does not know why the Bishop of Kakamega failed to take him back. He did not receive any pension since the year 2008. He was issued with a certificate of service which praised his good service.

11. The claimant prays for the reliefs set out in the plaint.

## **Defence**

12. The defence called major Antony Mwangangi Mutuku, Force No. 19088 to testify on its behalf. RW1 adopted witness statement filed on 1<sup>st</sup> August 2014 and dated 9<sup>th</sup> July 2014. RW1 testified that he knew the claimant since 2005 and that they were both selected to go to a UN mission in Southern Sudan. They went on 10<sup>th</sup> April 2007. That the claimant's commission was terminated about April 2008 due to matters that took place in Sudan.

13. That in Sudan, they had both military and spiritual obligations. As a Catholic he attended a church where claimant was a provost. He was elected chairman of the Parish Council. There was also a development group for the church mandated to improve the church infrastructure. They had decided to improve the Tabernacle and buy sound system. The church members contributed USD 2000 and money was given to the claimant who was going on leave to purchase the items in Kenya. The claimant instead bought very poor equipment in Kampala. The public address system was especially poor and it broke down all the time. The Christians complained all the time to RW1. The claimant also took personal emoluments from church contributions without authority. He became an enemy of the treasurer.

- 14.** The commanding officer set up a board of inquiry and RW1 was appointed chairman. Others in the committee were Major Kimodi and warrant officer Temi. The committee unearthed various malpractices by the claimant including irregular excommunication of a catechist and the purchase of substandard equipment. The claimant refused to talk to the committee. He told the treasurer that he was a thief and was stupid. He had planned a mass to pray for the catechist to die for opposing him.
- 15.** The committee recommended that all protagonists meet and reconcile. The commanding officer asked the priest to engage in reconciliation but he went back to his old ways. Many Catholic followers left the church because the claimant would reprimand them in his sermons. They joined the AIC church. When the mission came back to Kenya, the commanding officer made a report to Defence headquarters on the matter and the claimant's commission was terminated.
- 16.** RW1 told the court that Catholic priests are subjected to Force orders under section 19(8) of Defence Forces Standing orders. The priest must be beyond reproach. A priest is a specialist officer as opposed to General Service officers. As a specialist, he could not be charged under the forces Standing orders under Kenya Defence forces Act. The specialist officer can also not charge anyone under the Act. The most that could be done was the Bishop to return the priest to the parish he came from. The commission of the claimant was lawfully terminated by the President upon recommendation of the Defence Council.
- 17.** The claimant was given the minutes of decommission by the Defence council and was recalled to Diocese of Kakamega which had seconded him to the Military.
- 18.** RW1 told the court that one had to serve ten (10) years to be entitled to pension and lumpsum of the years served.
- 19.** The claimant however had served five (5) years and 186 days from 1<sup>st</sup> August to 2003 to 2008.
- 20.** The claimant was therefore entitled to payment of gratuity at the applicable rate on his salary. The letter of termination directed Treasury to process his gratuity and inform the claimant to collect the same. The claimant's Bank particulars were also given to the Treasury to transmit final dues.
- 21.** The assessment is done after full clearance by the officer and the return form is signed by all departments to indicate if officer owes any money to the Force. The officer must also clear with the Harambee SACCO.
- 22.** The claimant had a loan of Kshs.1.5 million with Bank and another loan of Kshs.168,000, salary recovery of Kshs.10,000; Harambee SACCO loan of Kshs.21,000 and Kshs.16.000 with another SACCO.
- 23.** It is the obligation of the officer to show that he has cleared the loans failing which set-off is done from the gratuity. The claimant had not complied with clearance requirement. The claimant states that the Force did not clear him.
- 24.** The claimant got a testimonial from the Force to enable him continue with his priesthood. RW1 said the testimonial was good. The reason for termination was not included. The force gives priests high respect because they guide the soldiers spiritually.
- 25.** The witness was candid and consistent under very close cross-examination by Mr. Bukele, Advocate for the claimant. RW1 said he did not have the two documents for the inquiry done in Sudan but his testimony reflects what took place there. The documents were given to Defence headquarters. RW1 said he had no reason whatsoever to frame his fellow commissioned officer and his priest for that matter.
- 26.** The Force does not keep the record of offence of a priest. He was decommissioned with a good record to enable him move on. He was only seconded to the office. The testimonial was given by the Bishop in the Armed Forces, a colonel in rank. He was the supervisor of the claimant. The claimant ought to have gone back to the Diocese.

27. The respondent prays that the suit be dismissed with costs.

## **28. Determination**

The issues for determination are as follows:

- i. Whether or not the claimant was lawfully decommissioned from the Armed Forces;
- ii. Whether or not the claimant is entitled to return to Kakamega Diocese;
- iii. Whether or not the claimant is entitled to any terminal benefits from the Armed Forces.

29. The court will deal with the three issues together.

30. The totality of evidence before court shows that the claimant was seconded by the Diocese of Kakamega to the Armed Forces. The claimant was commissioned as a specialist officer of the Armed Forces and as at the time he left, he was in the rank of captain. The claimant was appointed to a UN mission in Southern Sudan where he served the Kenyan Armed Forces as a priest. The claimant was involved in untoward activities as the leader of the church in Sudan leading to an inquiry chaired by RW1.

31. The committee of inquiry recommended that the claimant reconcile with his flock because his conduct had caused followers distress and some had left the Catholic church for AIC church in Southern Sudan.

32. Upon return of the UN mission from southern Sudan to Nairobi, the claimant was cited for misconduct while he was on mission in southern Sudan and was decommissioned from the Armed Forces. The claimant was given a good testimonial to allow him return to Kakamega Parish which had offered him to the Armed Forces. The claimant appear to have a dispute with his Bishop at the Kakamega Diocese which dispute has prevented the claimant from returning to serve in the Diocese. That dispute is beyond the jurisdiction of the court and as a matter of fact, has not been placed before the court for determination.

33. It is the court's finding that the claimant was properly and lawfully de-commissioned from the Armed Forces and was lawfully returned to serve in the diocese of Kakamega from where he was seconded to the Armed forces.

34. Upon separation, the claimant was entitled to payment of gratuity because he had served the Forces for less than ten (10) years and was therefore not pensionable. The payment of gratuity was subject to clearance and payment of debts owed to third parties by the claimant.

35. From the evidence before court it is not clear whether the claimant was given opportunity to clear from the Forces to allow him to access his gratuity.

36. It is however, clear that the claimant owed various amounts of money legible to be set-off against the gratuity payable. This remains the grey area in this matter. The respondent is obliged to clear the claimant. The claimant told the court that efforts to clear himself were hindered by lack of access to Defence headquarters since he is not allowed in there.

37. The court finds that respondents are at fault in preventing the claimant access to enable him properly clear from the Forces.

38. The respondents are also at fault in not rendering to the claimant statement of accounts to understand if there is a balance from the gratuity payable upon set-off of the lawful debts owed by the claimant.

## **Special damages**

39. The claimant testified that his house allowance was underpaid by Kshs.56,000 and was not paid in lieu of leave days not taken for five years served in the Forces in the sum of Kshs.275,000. The claimant also testified that he was erroneously deducted Kshs.14,000 as house rent, which he sought to be refunded.

40. The respondents did not provide any defence to these claims and the court finds them to have been proved on a balance of probability. The court therefore awards the claimant;

- i. Kshs.56,000 unpaid house allowance;
- ii. Kshs.275,000 in lieu of untaken leave; and
- iii. Kshs.14,000 in respect of erroneously deducted rent.

**Total award Kshs.345,000.**

41. Accordingly, the court makes the following final orders:

- i. The claimant's commission was lawfully terminated by the respondents.
- ii. The claimant is entitled to return to the Diocese of Kakamega, to serve as a priest, unless otherwise directed by the Head of the Catholic church.
- iii. The respondent to pay special damages in the sum of Kshs.345,000 with interest at court rates from date of filing suit till payment in full.
- iv. The respondents are bound to give access to the claimant to make full clearance to allow him access gratuity due and owing to him for the period served. This access be granted within thirty (30) days of this judgment.
- v. The respondents are directed to, within thirty (30) days of this judgment facilitate payment of gratuity due and owing to the claimant less any liabilities lawfully deductible from the said gratuity and render the accounts to this court within sixty (60) days from date of judgment.
- vi. The respondents to pay the costs of this suit.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of November 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**