



**REPUBLIC OF KENYA**

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

**CAUSE NO. 215 OF 2015**

**CHARLES GATHERU**

**NDIRANGU.....CLAIMANT**

**VERSUS**

**THE PRESBYTERIAN FOUNDATION (SUED ON BEHALF OF PCEA MIHUTI  
PARISH).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> December, 2016)

**JUDGMENT**

The claimant filed the statement of claim on 23.11.2015 through Gathara Mahinda & Company Advocates. The amended statement of claim was filed on 13.06.2016. The claimant prayed for judgment against the respondent for:

- a) A declaration that he was constructively dismissed.
- b) Underpayments and allowances for the last 10 years amounting to Kshs. 943, 140.00 including damages for 12 months under section 49(1) of the Employment Act, 2007; overtime worked for the last 10 years; gross underpayment for 10 years; and 10 public holidays for 10 years.
- c) Certificate of service.
- d) Costs and interests of the suit.

The memorandum of response was filed on 16.03.2016 through Peter M. Muthoni & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The claimant was employed at the respondent's Mihuti Parish in 2003 as a security guard. The Parish has effective 30.11.2014 been subdivided into New Mihuti Parish, Karundu Parish, and Giathugu Parish.

The claimant's case is that he resigned from employment on 27.06.2013 at a time he earned Kshs.7, 575.00 per month. The resignation followed the respondent's letter dated 08.04.2013 addressed to the claimant by the session clerk. The letter stated as follows:

**“Dear Sir,**

**RE: 2012/2013 ANNUAL LEAVE**

**Receive greetings in the name of our Lord Jesus Christ. The purpose of this letter is as per the reference above.**

**We have noted with concern the status of your family even after being counselled by your District elder and deacons in November 2012.**

**Further, even after admonition by the parish Minister in December 2012 you did not put any effort to make your family stable.**

**Finally, the Session office rebuked you on 4<sup>th</sup> April 2013 on such. Because of the above quoted disciplinary measures have been taken, the session office has no option left except to send you on leave from 08.04.2013 to 08.05.2013 for you to:**

- 1. To stabilize the status of your family in order to remove the scandal from the church.**
- 2. Be a full member as per the Church constitution.**

**Report to the session office on 9<sup>th</sup> May 2013 at 8.00am.**

**Note that this letter is a first warning.**

**Yours in Christ service,**

**Signed**

**William W. Kwai**

**SESSION CLERK**

**CC: -Parish Minister**

**-Presbytery Clerk**

**-Presbytery Moderator”**

The claimant's evidence was that the letter was issued in circumstances whereby he was not a member of the church and such membership was not a term of his contract of service. The claimant testified that since his employment on 08.07.2003 he had served with a clean record. His problems had started when Reverend Anne Wanjiru Gitahi was deployed to the Parish.

The claimant's evidence was that the Reverend started assigning the claimant's wife (one Esther Wangari Mwangi) some domestic duties at the Reverend's residence and at the church. In that process the Reverend and the claimant's wife became close and would discuss the claimant's family and private life. The claimant's evidence was that the Reverend then started to hate the claimant. The claimant testified that the Reverend then started sending some deacons to the claimant's house whenever the claimant had a domestic difference with his wife with a view of the deacons reconciling the claimant with his wife. The claimant's case was that the Reverend hated him as she never spoke to him and there was no cordial relationship between the claimant and the Reverend.

The claimant's evidence was that, in the meantime, the continued church delegations to his house made the relationship with his wife to worsen and to break down; the wife deserted with two of the issues and leaving the claimant with one of the issues of the family. The Reverend assigned the claimant extra duties – the testimony being that as a night guard he worked from 6.00pm to 6.00am but was thereafter assigned to fetch water, feed livestock, attend to flower beds, and wash the Reverend's car. The claimant lamented that he was not paid for the extra assignments.

In that process, the claimant was served with the letter of compulsory leave. He reported on 09.05.2013 as was scheduled but was told to go home and to report back on 06.06.2013. He reported on 06.06.2013 and he was again told to go away until further notice. He was never recalled.

The claimant testified that he became frustrated. It was unfair, according to the claimant, for the Church to demand that he becomes a full member of the Church and to stabilise his family as required by the Church because he was not a member of the Church and such demands were strange to his contract of service as a night guard.

The claimant, faced with such frustrations, wrote to resign as per the letter dated 27.06.2013. He attached his claims for unpaid overtime being offs for 10 years due and not taken or paid for and pay for public holidays worked; and service pay at 15 days worked for each of the 10 years of service.

The claimant's last day at work had been on 27.06.2013 having been put on forced leave on 08.04.2013 and he resigned on 27.06.2013.

The **1<sup>st</sup> issue** for determination is whether the respondent is not suited by reason of the subdivision of Mihuti Parish. It was submitted for the respondent that the subdivision of the Parish into 3 new Parishes would make satisfaction of the decree impossible. First, the court finds that the subdivision of the Parish did not affect the respondent's legal personality. Second, the 11 congregations that constituted the original Mihuti Parish were still in existence and their role, if any, in satisfaction of the decree cannot be said to have been fatally defeated. Thus the court returns that the respondent is still a proper party to the suit despite the subdivision of the original Mihuti Parish.

The **2<sup>nd</sup> issue** for determination is whether the claimant's employment was terminated and if yes, whether it was unfair. The court has considered the evidence. The claimant's service was made impossible when the respondent imposed extraneous requirements that the claimant stabilizes the status of his family in order to remove an undisclosed scandal from the Church; and further the claimant becomes a full member of the Church per the constitution of the Church. The evidence is that at no point was the claimant a member of the Church and the court returns that he was not bound by the policies and doctrines of the Church. The further evidence is that the claimant's membership in the church and stabilizing his family per the constitution of the Church have not been established to have been terms of the claimant's contract of service. As envisaged in section 45 (2) (a) and (b) of the Employment Act, 2007, it has not been established by the respondent that such requirements related to the claimant's conduct, capacity or compatibility; or were based on the operational requirements of the employer. Thus, a termination of employment would be unfair if initiated upon such reasons as was done by the respondent. By that respondent's conduct, the court returns that the claimant was entitled to consider himself terminated from employment by the respondent and the claimant was entitled to resign as he did on 27.06.2013. The court returns that the termination was constructive and unfair in view of the indefinite compulsory leave and in view of the respondent's imposition of the unfair requirements against the claimant to become a member of the Church and to stabilize his family in line with the constitution of the Church.

The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the evidence, the pleadings and the submissions and makes the following findings:

1. The claimant is entitled to the declaration that the termination was constructive and unfair.
2. The claimant wished to continue in employment. He had served for more than 10 years with a clean record. The respondent introduced extraneous requirements that the claimant joins the Church and stabilizes his family per the constitution of the Church. It was an aggravating factor that by reason of the respondent's actions, the claimant's family was broken. The court awards the claimant 12 months' pay for compensation under section 49 (1) (c) of the Employment Act, 2007 at Kshs.7, 575.00 per month making **Kshs.90, 900.00**.
3. The suit was filed on 23.11.2015. The cause of action was on 27.06.2013 or earlier upon the imposition of the compulsory leave. Under section 90 of the Employment Act, 2007 suits for

continuing injuries should be filed within 12 months from the date of the cause of action in this case being by 27.06.2013. The court considers that the claims for underpayment, unpaid overtime, holidays, off days, and annual leave are such continuing injuries and the claims and prayers in that regard were time barred. The same will therefore fail.

4. The claimant is entitled to a certificate of service.

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

- a) The declaration that the termination of the claimant's contract of employment was constructive and unfair.
- b) The respondent to pay the claimant **Kshs.90, 900.00** by 01.02.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c) The respondent to deliver to the claimant a certificate of service by 01.02.2017.
- d) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 16<sup>th</sup> December, 2016.**

**BYRAM ONGAYA**

**JUDGE**