



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1677 OF 2011**

**KUDHEIHA .....CLAIMANT**

*VERSUS*

**ORTHODOX ARCHBISHOPRIC OF KENYA AND IRINOUPOLIS....RESPONDENT**

Mr. John Obina for claimant

M/S. Kaniu for respondent

**JUDGMENT**

1. The suit was brought vide statement of claim on 3<sup>rd</sup> October 2011.

**Facts of the claim**

2. The grievant Peter Imbayi Indasi was employed by the respondent on or about 1<sup>st</sup> September 2003 as an accountant / clerk / bursar and worked continuously until 28<sup>th</sup> October 2010, a period of about seven (7) years.

3. The grievant earned a monthly salary of Kshs.20,000.

4. It was agreed however, that for the 1<sup>st</sup> year of the contract, the claimant would earn Kshs.4,000 per month, Kshs.7,000 per month by the third year, and Kshs.10,000 by the 4<sup>th</sup> year due to financial constraints.

5. On 28<sup>th</sup> August 2007, the claimant was promoted to the position of assistant personnel for a period of four months while the incumbent was on leave while involved in the general elections.

6. The grievant was summarily dismissed by a letter dated 28<sup>th</sup> October 2010. The letter provides the following reasons for the dismissal:

1. Continuous refusal to observe organizational code of conduct inspite verbal warnings and subsequent disciplinary actions;

2. Forgery of payslips in the name of the Orthodox Archbishopric of Kenya, the respondent to fraudulently obtain a loan from the Orthodox Development Savings and Credit Society Limited and

Equity Bank respectively;

3. Spreading of unfounded malicious rumours at the work place hence causing disharmony at the work place.

7. This conduct was termed gross misconduct which attracted the sanction of summary dismissal.

8. Prior, the claimant had received a letter dated 28<sup>th</sup> November 2008 which terminated the claimant's employment on account of redundancy. The claimant was then reinstated to employment verbally on 26<sup>th</sup> January 2009.

9. The grievant appealed the decision to summarily dismiss him and the dispute was reported to the Ministry of Labour on 2<sup>nd</sup> February 2010.

10. A conciliator was appointed on 24<sup>th</sup> December 2010. The respondent did not attend conciliation meetings on 3<sup>rd</sup> and 17<sup>th</sup> of March 2011. The dispute was not resolved and was referred to court.

11. By a memorandum of agreement between the claimant and the respondent, the employees of the respondent received salary increments of 6.5% on the basic salary with effect from 1<sup>st</sup> January 2008 and 6.5% on the basic salary with effect from 1<sup>st</sup> January 2009.

12. The grievant denies that he ever forged any documents to obtain a loan and in his oral testimony told the court that the human resource department of the respondent approved the loan application on the basis of the acting position he held at the time.

13. The grievant further testified that for the period 28<sup>th</sup> November 2008, and 28<sup>th</sup> October 2010 when his employment was temporarily terminated, he was not paid any salary and claims the same.

14. The grievant stated that he was subsequently declared redundant without following the procedure set out under section 40 of the Employment Act, 2007.

15. The claimant denies all the allegations made against him in the letter of summary dismissal dated 28<sup>th</sup> November 2008.

16. The grievant produced the payslips he had used to obtain a loan stating that they were genuine slips obtained from Mr. Ilako an employee of the respondent and the same bear his signature. Mr. Ilako was the human resource manager at the time. According to the payslip, the basic salary of the claimant was Kshs.36,550 following the increments.

17. The grievant stated that he was aware that he earned Kshs.20,000 but the human resource manager Mr. Ilako prepared the handwritten payslip for purposes of obtaining the loan from the bank.

18. The claimant prays for terminal benefits in terms of the CBA as follows;

i. Three months salary in lieu of notice Kshs.60,861.00

ii. Four (4) months acting allowance Kshs.172,000 (43,000 x 4);

iii. paternity leave for the year 2008 for one hundred eleven (111) days in the sum of kshs.7,588;

iv. Payment in lieu of public holidays worked Kshs.3,333.30

v. service gratuity for seven (7) years Kshs.75,738.10.

- vi. Service gratuity for seven (7) years Kshs.75,738.10.
- vii. Annual leave travelling allowance for 2003 to 2007 at Kshs.2900 per each Kshs.11,600.
- viii. Arrear salary from 9<sup>th</sup> September 2003 to September 2005 Kshs.384,000.
  - (b) October 2005 to September 2006 Kshs.156,000;
  - (c) October 2006 to January 2007 Kshs.60,000.
  - (d) Arrear salary as per the CBA increment (6.5%) for 2007 – Kshs.12,682.80;
  - (e) Arrear per CBA – 2007 at 6.5% Kshs.13,507.20.
  - (f) Arrear per CBA for year 2009/2010 per annum Kshs.15,778;
  - (g) Payment in lieu of leave for the years 2003 to 2006 Kshs.60,861.00;
  - (h) Compensation for unlawful declaration of redundancy Kshs.243,44;

Total claim Kshs.292,392.60.

## **Defence**

19. The respondent filed a statement of defence with supporting annexures on 5<sup>th</sup> April 2012.

The respondent questioned the capacity of the union to institute the suit on behalf of the grievant.

The respondent denies having issued the grievant a letter of appointment with a basic salary of Kshs.20,287.00 though it admits having employed the grievant. The said letter was issued by the Orthodox Teachers College of Africa on 3<sup>rd</sup> September 2003.

20. The respondent denies ever having budgetary constraints and denies the content of the letter of appointment issued to the grievant.

The respondent also denies having promoted the grievant as alleged or at all.

The respondent however admits having terminated the employment of the grievant on grounds of redundancy but the same was not effected because the grievant continued to earn his salary.

21. The respondent alleges that the grievant was suspended for the period 28<sup>th</sup> November 2008 to 26<sup>th</sup> January 2009.

The respondent avers that upon investigations the grievant was reinstated verbally on 26<sup>th</sup> January 2009 having found no strong evidence to incriminate him.

22. The respondent produced a letter allegedly written by the claimant on 16<sup>th</sup> June 2011, seeking for mercy and reinstatement or reducing the disciplinary action from dismissal to redundancy.

23. The claimant received Kshs.50,000 on 7<sup>th</sup> July 2011 and he acknowledged that this payment was philanthropic assistance and further acknowledged that he was retired in public interest.

24. The respondent called RW1 John Ndung'u Keriko, an assistant personnel supervisor to testify on behalf of the respondent. RW1 was employed by the respondent in the year 2002.

25. RW1 stated that at the time the grievant was employed by the respondent, at the Orthodox College he was an employee of the respondent. RW1 denies that the grievant acted as assistant personnel, since RW1 held that position.

26. RW1 told court that grievant and twelve (12) others were declared redundant on 28<sup>th</sup> November 2008 and were paid terminal benefits.

27. That the grievant refused to leave office and he continued to earn a salary. RW1 said the grievant did not receive the letter of redundancy but was on 28<sup>th</sup> October 2010, summarily dismissed for gross misconduct on account of the offences stated earlier in the judgment.

28. That the grievant forged his payslip to get a loan with Orthodox SACCO. RW1 said that the grievant was paid Kshs.50,000 gratuity upon dismissal following an appeal to the Archbishop.

29. RW1 told the court under cross examination he does not remember the respondent having appointed the grievant to act in his place. RW1 says that he was given two weeks, not three months to seek elective office.

### **30. Determination**

The issues for determination are:

- i. whether the claimant union has capacity to act for the grievant;
- ii. whether the grievant was an employee of the respondent in terms of the letter of appointment dated 3<sup>rd</sup> September 2003;
- iii. whether the claimant has proved on a balance of probability the terminal benefits claimed;
- iv. whether the summary dismissal was for a valid reason and in terms of a fair procedure.

#### **Issue i**

31. It is not in dispute that the claimant union has a collective bargaining agreement with the respondent and it negotiated terms and conditions of service for all the employees of the respondent.

32. The grievant being an employee of respondent was a beneficiary of the negotiated CBA whether he was a member of the union or not. It is sufficient that the grievant was a unionsable employee by virtue of the junior position he held in the respondent's employment. In this respect the union was entitled to collect agency fee from the grievant if he was not its member.

33. It follows that the union has locus standi in *judicio* by fact of the recognition agreement, and CBA to act for all unionsable employees of the respondent. The preliminary objection is thus dismissed.

#### **Issue ii**

34. From the totality of evidence before court, including the pleadings, the letter of appointment itself, the various correspondence between the grievant and the respondent regarding his employment including the letter declaring the grievant redundant and the subsequent letter of summary dismissal, and the various payslips produced by both the claimant union and the respondent coupled with the sworn testimony by the grievant and RW1, the claimant has proved on a balance of probability that the grievant was indeed an employee of the respondent and was stationed at a training college owned by the church.

35. The claimant has proved that he was an employee of the respondent and was appointed vide the letter dated 3<sup>rd</sup> September 2003 produced by both parties.

### **Issue iii**

36. With regard to the terminal benefits claimed by the claimant on behalf of the grievant under paragraph 4 to 8 of the statement of claim and supported by the grievant's sworn testimony, it is the court's considered view that:

a) the letter of appointment granted the grievant a basic salary of Kshs.20,000 per month but due to budget constraints, the grievant was not paid his full salary as explained in the letter. The respondent did not bother to counter the contents of this letter but instead chose to denounce the same in general terms. The claimant has proved on a balance of probability that in terms of the letter of appointment, the grievant is owed by the respondent the various arrear salary set out in the statement of claim and awards the same accordingly;

b) the court also finds that the claimant has proved on a balance of probability that it had concluded a CBA with the respondent which set out further terms of employment of all unionsable employees of the respondent including the grievant. The negotiated CBA terms therefore apply to the grievant as follows:

i. the general wage increment for the year 2008 and 2009 at 6.5% respectively;

ii. the annual leave of 26 working days.

iii. leave travelling allowance of Kshs.2,613 per annum;

iv. severance pay at the rate of 19 days salary for each completed year of service upon being declared redundant;

v. work done during public holidays.

37. Accordingly, all the claims in this respect set out in the statement of claim have been proved on a balance of probability and are awarded accordingly.

### **Compensation for unlawful termination of employment**

38. The grievant was declared redundant and was reinstated to employment and was subsequently summarily dismissed for misconduct.

39. The claimant has not placed enough evidence before court to discharge the onus.

40. Indeed the grievant in his testimony admits an exaggerated payslip was used by him to apply for a SACCO and bank loan. Blaming the human resource manager does not absolve him from the fraudulent presentation which amounted to gross misconduct.

41. This being the case, the court gives the respondent the benefit of doubt and dismisses the claim for compensation for alleged unlawful termination of employment.

### **Notice pay**

42. The claim for payment of three months' salary in lieu of notice does not receive support from the letter of appointment or the CBA produced before court.

43. Judgment is entered in favour of the claimant as follows:

**i. salary arrears Kshs.641,968.00;**

**ii. payment in lieu of leave Kshs.60,861.00;**

**iii. leave travelling allowance Kshs.11,600.00;**

**iv. seven (7) years service pay Kshs.75,738.70;**

**v. payment for work done during public holidays Kshs.3,333.30;**

**vi. acting allowance four (4) months Kshs.172,000.00;**

**vii. Paternity leave Kshs.7,588.00;**

**total award Kshs.821,889.30;**

**viii. cost of the suit;**

**ix. grant of certificate of service within thirty (30) days from date of judgment.**

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of December 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**