



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1678 OF 2012**

**DAVID MOKAYA MOGERE.....CLAIMANT**

**VERSUS**

**REV. FR. DENNIS ROGENA M. ONDIEKI.....1<sup>ST</sup> RESPONDENT**

**BOARD OF GOVERNORS ST. FRANCIS YOUTH**

**POLYTECHNIC BORABU.....2<sup>ND</sup> RESPONDENT**

**ST. ANDREWS KAGGWA NYANSIONGO**

**CATHOLIC PARISH.....3<sup>RD</sup> RESPONDENT**

**CATHOLIC DIOCESE OF KISII.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondents on 18<sup>th</sup> September 2012 and averred that the 1<sup>st</sup> Respondent was a representative and/or servant of the 4<sup>th</sup> Respondent and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are institutions owned by the 4<sup>th</sup> Respondent and thus the 4<sup>th</sup> Respondent is vicariously liable for the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Claimant averred that on 3<sup>rd</sup> November 2011 the 1<sup>st</sup> Respondent barricaded the entire institution by padlocking and welding as a result denied the Claimant access. He averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents without any reasonable cause issued the Claimant with indefinite compulsory leave. He averred the termination of his services was unfair and actuated by malice. He claimed salary withheld from May 2011 to date at rate of 10,000/- per month, NSSF for 24 years at rate of 400/- a month, one month salary in lieu of notice, house allowance at rate of 3,000/- for 24 years, medical allowance at rate of 1,000/- for 24 years, travelling allowance at rate of 1,000/- for 24 years, 12 months salary compensation, terminal benefits of 4 months salary for each year worked, costs of the suit, damages, certificate of service and interest on the sums claimed.
2. The Respondents filed a Statement of Defence on 16<sup>th</sup> October 2012. In the Statement of Defence, the Respondents averred that the Claimant was non-suited against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents as they did not have any contract of employment with him and that he was employed by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent denied that the Claimant was earning a salary of 10,000/- a

month. The 2<sup>nd</sup> Respondent denied ever terminating the Claimant's employment. The Respondent averred that the Claimant's management of the St. Francis Youth Polytechnic Borabu was replete with irregularities and mismanagement which necessitated the 2<sup>nd</sup> Respondent to send the Claimant on compulsory leave to facilitate an audit of the Claimant management of the 2<sup>nd</sup> Respondent's institution. It was averred that the Claimant was given an opportunity to be heard before he was sent on compulsory leave.

3. The Claimant testified on 26<sup>th</sup> February 2014 and stated that he was employed by St. Francis Youth Polytechnic as a mechanic cum manager. He testified that he found a new watchman on 1<sup>st</sup> November 2011 and was advised that the 1<sup>st</sup> Respondent had closed the institution. He testified that he was called for a meeting on 14<sup>th</sup> November and the meeting was held at the institution and he was asked for the institution log book and other essential documents. He testified that the meeting was adjourned to 24<sup>th</sup> November 2011. He stated that he was not given any warning or notice. He testified that he never got any explanation for the office being locked. He testified he was given a compulsory leave letter and was not paid his terminal dues as well as salary for some months. He thus claimed house allowance, leave pay and the damages sought.
4. He was cross-examined and testified that he was on compulsory leave and he never got a termination letter. He stated that terminal benefits are given when one is terminated or dismissed. He testified that he had sought a declaration that his termination was unlawful. He denied being involved in financial irregularities.
5. He was re-examined and testified that when the incident happened the office was closed and to date he has no access to the compound. He was on compulsory leave since then and assumed that his services were terminated.
6. The Court sought to know if he attended the meeting of 29<sup>th</sup> December 2011 and he confirmed that he attended on 29<sup>th</sup> December 2011.
7. The Respondents called the 1<sup>st</sup> Respondent as their witness. He testified that he was a Catholic priest and the St. Andrews Kaggwa Parish head and was in charge of several institutions including a primary school, a secondary school and the village polytechnic. He testified that the Claimant had not been terminated but was suspended. He testified the letter indicated the reason for the termination. He denied closing the institution and that he had sought the Claimant to bring them into the picture on the state of the institution as the Claimant had prematurely closed the institution. He testified that the Board met the Claimant on 14<sup>th</sup> November 2011 and also on 24<sup>th</sup> November 2011 and it was at the meeting of 24<sup>th</sup> November that it was decided that the Claimant goes on compulsory leave to end on 29<sup>th</sup> December 2011. He testified that as the Board and the Claimant were inspecting the institution they were served with the letter from the Claimant's advocates. He testified that as far as they were concerned the Claimant was suspended and remained the manager but the 2<sup>nd</sup> Respondent has to await the outcome of the legal process the Claimant instituted before concluding its process. He testified that the Claimant resided in the house for the manager of the institution.
8. He was cross-examined and testified that he was the overseer and sponsor of the institution and that the Claimant was called to meeting and attended though he did not have proof of service of the letters on the Claimant. He conceded that the meetings involved members of the parish and some members of the Board. He conceded the letter giving the Claimant compulsory leave was not signed by Board members or issued by the Board. He admitted that the letter of compulsory leave was from Nyansiongo Parish and not the 2<sup>nd</sup> Respondent. He signed the letter.
9. In re-exam he testified that the Claimant was given the letters. He testified that he has never paid the Claimant and did not know how much the Claimant earned. He stated that the Claimant was

served with letter of compulsory leave and that he attended the meeting on 29<sup>th</sup> December 2011. He denied there being any malice in the steps taken by the 2<sup>nd</sup> Respondent or the steps he took.

10. The Claimant filed written submissions on 26<sup>th</sup> November 2014 and he reiterated his testimony and that of the Respondent's witness and submitted that he was unfairly and unlawfully terminated from service. He submitted that he was entitled to his dues as per the claim. The Respondent filed written submissions on 26<sup>th</sup> November 2014. The submissions restated the Respondent's position and further submitted that the Claimant had not proved his case. The Respondents thus sought dismissal of the claim.
11. The Claimant was by all accounts an employee of the 2<sup>nd</sup> Respondent and though he claimed vicarious liability attached to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent, it was clear that only the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent played a role in the matter. He thus was non-suited against the 1<sup>st</sup> and 4<sup>th</sup> Respondent and I strike out their names from the suit. He testified that he was employed by the Respondents. The 1<sup>st</sup> Respondent admitted the Claimant was a manager of the 2<sup>nd</sup> Respondent though he did not know the amount the Claimant earned per month. The Claimant's services were suspended from 24<sup>th</sup> November 2011 and he was to return for a meeting on 29<sup>th</sup> December 2011. It was on that day that the Claimant's advocates letter reached the Respondents thus stalling further disciplinary process. In my view the termination of the Claimant was constructive since from 29<sup>th</sup> December 2011 the Claimant was not at his work place and was not paid a salary from then.
12. Was the dismissal fair? I think not. The Respondents opted to wait for the outcome in Court and thus to my mind were unwilling to take action though the Claimant was not acting as manager for the 2<sup>nd</sup> Respondent. In view of the failure to terminate the services of the Claimant procedurally I would hold that the Claimant's services were terminated contrary to the law and the Claimant is entitled to recover. It is the testimony of the Claimant that he was suspended by the 3<sup>rd</sup> Respondent's official a fact confirmed by the 1<sup>st</sup> Respondent when he testified before Court. On scrutiny of the documents filed it is clear the suspension was given by a total stranger to the contract. This attracts the application of maximum compensation under Section 49 of the Employment Act. The Claimant earned Kshs. 10,000/- per month as basic pay and was provided with housing. He thus is entitled to Kshs. 120,000/- for unlawful and unfair dismissal from work. He sought house allowance and he is not entitled to it as he was housed by the institution. His claims for allowances for 24 years are time barred and would not lie. In any event he did not prove he was entitled to them. He also did not prove he was entitled to the reliefs relating to his NSSF dues. In the premises his claim would fail in that regard. He earned Kshs. 10,000/- per month and was not given notice. He is thus entitled to notice as his services were terminated by effluxion of time without him being given any notice.
13. The Claimant was not issued with a certificate of service which is an entitlement. It is thus available to him in terms of Section 50 of the Employment Act.
14. In the final result I enter judgment for the Claimant against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for :-
  - a. Kshs. 120,000/- as compensation for unlawful termination,
  - b. Kshs. 10,000/- as notice pay
  - c. Interest on the above from date of judgment till payment in full at 12% per annum
  - d. Certificate of service

Orders accordingly.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of January 2015**

**Nzioki wa Makau**

**Judge**