



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2552 OF 2012

(BEFORE HON. JUSTICE MAUREEN ONYANGO ON 26.1.2015)

GRACE KATHURE MUGWIKA CLAIMANT

-VERSUS-

REGISTERED TRUSTEES OF ANGLICAN

CHURCH OF KENYA (A.C.K) RESPONDENT

JUDGMENT

By a Statement of Claim dated 18th December 2012 through the firm of Nyabena Nyakundi & Co. Advocates and filed on 20th December 2012, the claimant alleges she was unfairly terminated by the respondent who also refused to pay her full terminal benefits. She seeks a declaration that the termination of her employment was unfair, terminal benefits of Kshs 2,772,942.50, costs and interest. She also seeks orders that the respondent issues her with a certificate of service.

The respondent filed a Statement of Defence on 18th February 2013 through Ndumu Kimani & Co. Advocates in which it denied the claim and averred that the claimant's employment was terminated in accordance with her terms of service and she was paid her full terminal benefits.

The case was heard on 27th January and 19th June 2014. The claimant testified on her behalf while the respondent called Venerable Fredrick Muchui Kibabi, Vicar of ACK St. Peters Kahawa Sukari. The claimant was represented by Mr. Nyabena while the respondent was represented by Mr. Kimani. The parties thereafter filed written submissions.

The main facts of the case are not contested. The claimant was employed by the respondent as Parish Secretary by letter dated 3rd May 2005 at a starting salary of Kshs 8,140. She was also entitled to a house allowance of 50% of basic salary, Kshs 25% reimbursable out-patient medical allowance. She was also to join the Church's provident fund upon completion of probation in which the church would contribute 10% of her basic salary and she would also contribute the same.

The claimant's employment was confirmed by letter dated 26th August 2005 with effect from 1st August 2005. The letter of confirmation confirmed her joining of provident fund, annual leave of 26 days and maternity leave of 60 days.

The claimant testified that on 30th September 2011 at around 8.15 pm she received a call on her cellphone from the Vicar in-charge Peter Machira requesting her to go to the office the following day in the morning to pick her letter. The following day on 1st October 2011 she went to the office and found the letter on her desk. Upon reading it she discovered it was a letter of termination. The letter is

reproduced below:-

"September 30, 2011

Mrs. Grace Kathure Mugwika

C/o Box 65050-00618

NAIROBI

Dear Grace

REF: TERMINATION OF EMPLOYMENT

The Parish Church Council meeting held on 13th September 2011 in the Church boardroom at 7.30 pm decided that your services be terminated. We are now writing to inform you of this decision that takes effect on 30th September 2011.

You will be paid your dues as below:

- 1. 15 days for every completed year of service worked (calculated with the last basic salary)**
- 2. One month notice**
- 3. Any pending annual leave**
- 4. Wages up to and including the last day worked.**

Please hand over all belongings in your custody or under your care to Simon Njuguna. Finally, we take this opportunity to sincerely thank you for the services that you have given to us during the period that you have been with us.

We wish you God's blessings in your future plans and endeavors in life.

Yours in the Lords service

Ven. Canon Peter Machira

Vicar.

cc. Pcc Secretary

Treasurer

Vicars Warden

People's Warden

Chairman, FGPC."

The claimant alleges the termination was unfair as the letter of termination did not assign any reason to the termination and she was never given a hearing as provided under the Employment Act 2007.

The respondent admits that there was no reason or hearing but avers that the letter complied with the claimant's letter of appointment.

The issues for determination are whether the termination of the claimant's employment was unfair and whether she is entitled to the reliefs sought. The claimant relied on the following authorities: **David B.**

Kayondo V The Co-operative Bank Kampala HCC No. 899/89, Mohammed Ghias Guereshi & Anor V Paramount Bank Ltd HCCC No. 1557/97 Nairobi, National Cereals & Produce Board V Albert Ongaro (Civil Appeal No. 9/99, Seraphin Obwolo V Barclays Bank Kampala HCCC No. 682/95, C. B. Kibigire V Uganda Commercial Bank Kampala HCCC No. 606/85.

None of the authorities were provided to the court and the same have therefore not been considered. The respondent did not cite any authority.

Whether claimant's employment was unfairly terminated: The claimant's letter of termination does not assign any reason for the termination. Section 45 of the Employment Act provides that termination of employment must be for valid reason and the procedure must be fair. Section 41 provides for what constitutes fair procedure.

The respondent admitted not assigning any reason or complying with Section 41 on fair procedure. The respondent argued that the termination was in accordance with the claimant's letter of appointment.

Section 26 of the Employment Act provides that the terms provided for in the Act are minimum terms. Section 93 of the Employment Act on transitional provisions provides that a contract of service entered into prior to the coming into operation of the Employment Act 2007 shall be read and construed as if it were a contract made in accordance with and subject to the provisions of the Act and parties thereto shall be subject to those provisions accordingly.

For these reasons, the respondent was under obligation to comply with the Employment Act 2007 and failure to comply therewith constituted unfair termination of employment. I therefore declare that the termination of the claimant's employment, having failed to comply with Section 41 and 43 as envisaged by Section 45 of the Act, was unfair.

Whether the claimant is entitled to the remedies sought:

I now consider the claimant's prayers. Before doing so I have to determine which terms are applicable to the claimant as she has pleaded that the terms contained in the Diocese of Nairobi Terms of Service 2009 are the applicable terms while the respondent denies that those terms are applicable.

The claimant's reasons are that she was enjoying out-patient medical benefits of Kshs 50,000/= per annum, owner occupier housing allowance at 60% of basic salary, that these were terms contained in the Diocese of Nairobi Terms of Service 2009 and she is therefore entitled to those terms.

The respondent argued that the claimant was not a diocesan employee and the terms did not therefore apply to her as she was an employee of the parish under the direct supervision of the Vicar in-charge.

I have carefully studied the Diocese of Nairobi Terms and Conditions of Service 2009. The 2nd and 3rd paragraphs of the preamble thereto provide as follows:-

"These terms of service have been drawn having regard to the changes in the policy environment. There is a new Employment Act of 2007 in place. It is our recommendation that every body will comply with these terms.

It is intended to, among other things; ensure that discriminatory practices are eliminated within the workplace, staff are treated with dignity and that employers have a responsibility to uphold human rights in dealing with staff. It is the duty of every Parish Council to ensure that they abide by the provisions of the Employment Act and clarification should be sought on areas that may not be clear in order to avoid possible penalties for non compliance."

The claimant's letter of appointment also states at paragraph 1 thereof that the employment is "in accordance with Labour Laws, Anglican Church of Kenya Terms and Conditions of Service."

I am therefore satisfied and find that the claimant's terms of employment at the time of leaving employment were in accordance with the Diocese of Nairobi Terms of Service 2009 whose implementation date was 1st January 2009.

(i) Notice

The claimant seeks payment of 1 month's salary in lieu of notice at Kshs 47,104/=.

From the claimant's description of her duties in her letters dated 5th August 2008, 3rd November 2008 and 2nd January 2011 in which she sought a job description, she was more than a secretary. She was an office administrator. She handled finances and allowances, did secretarial work for the diocese and the out parishes, prepared church programs, supervised other staff, handled buildings and maintenance, youth, Sunday school and mothers affairs among others. I am satisfied that she was entitled to payment as a personal secretary and more.

According to the Diocese of Nairobi Terms of Service 2009, I agree with the claimant that her salary for 2008 which was her 5th year should have been Kshs 25,000/= with a house allowance (owner-occupier) of 60% and in 2011 when her employment was terminated, Kshs 29,440. It is worth noting that the claimant asked for a job description six times between August 2005 and January 2011 and did not receive even a single response. In her letters she was requesting for review of salary and job description as the work she was doing was more than she was appointed to do or was being paid for.

I award the claimant Kshs 47,104/= being gross salary (basic salary and 60% house allowance) being one month's salary in lieu of notice.

(ii) Leave

The respondent attached leave forms showing that the claimant took all her leave of 26 days and an additional 6 off days from 21st April to 4th May 2011 and again from 21st July to 19th August 2011.

She is therefore not entitled to any leave days for 2011. The claim is dismissed.

(iii) Maternity Leave

The claimant seeks maternity leave for January 2006. She alleges that she went on maternity leave but was recalled to work with auditors in January 2006. In the first place there is no proof presented by the claimant that she ever took maternity leave in January 2006. Secondly, even if she had proved it, the claim would be time barred as she filed her claim in December 2012, about 7 years after the claim accrued in January 2006.

I therefore find that the claim has not been proved and dismiss the same.

(iv) Overtime

The claimant's letter of appointment provides that she may be required to work additional hours on week days or weekends to meet special requirements in consideration of her position. I find that she is not entitled to overtime.

(v) Service Gratuity

The claimant was paid gratuity at 15 days basic salary per completed year of service. However this was based on a salary of Kshs 17,537.50/= instead of Kshs 29,440/=. She was entitled to gratuity of $(29,440 \times \frac{13}{30} \times 6)$ Kshs 88,320/= but was paid Kshs 52,612.50. I award her the difference of Kshs 35,707.50/=.

(vi) Years to Retirement - 13 years

The Employment Act does not provide for payment of years remaining to retirement. This was elaborated by the Court of Appeal in the case of Menginya Salim and by this court in the case of D. K. Marete V Teachers Service Commission [2913] eKLR. I find no legal basis for the claim and dismiss the same.

(vii) Medical Refund

The claimant has not produced any proof that she incurred medical expenses in the sum of Kshs 3,665 for which she is entitled to reimbursement. I dismiss the claim for want of proof.

(viii) Salary Underpayment

As I stated herein above, the claimant was entitled to payment as personal secretary under the Diocese of Nairobi Terms of Service 2009. She was therefore underpaid by Kshs 12,150 in 2009, Kshs 12,110 in 2010 and Kshs 11,902.50 in 2011 per month making a total of Kshs 145,800/= (12 months) in 2009, Kshs 145,320 (12 months) in 2010 and Kshs 107,122.50 (9 months) in 2011. I award her Kshs 398,242.50 on account of underpayments of basic salary.

(ix) House Allowance underpayments

The claimant is entitled to house allowance underpayments which were based on 60% of basis salary as follows:-

2009 @ 7,300 for 12 months	= Kshs 87,600
2010 @ 7,266 for 12 months	= Kshs 87,192
2011 @ 7,141.5 for 9 months	= Kshs 64,273.50
TOTAL	= Ksh 239,065.50

I award the claimant the said sum on account of house allowance underpayments.

(x) 12 months compensation

The claimant seeks compensation of 12 months salary on account of unfair termination.

Having found that she was unfairly terminated, she is entitled to compensation as provided in Section 49(1)(c) of the Employment Act.

Having worked for just over 6 years and taking all the circumstances of her case into account, I award the claimant 8 months gross salary as compensation in the sum of Kshs 376,832/=.

(xi) Certificate of Service

The claimant is entitled to certificate of service which I order the respondent to issue within 30 days from date of judgment.

I hasten to add that it is not the responsibility of the claimant to request for a certificate of service as the respondent alleged herein. According to Section 51 of the Employment Act, "An employer shall issue to an employee a certificate of service upon termination of employment." In my opinion the certificate of service should accompany the letter of termination or terminal dues. The excuse often given by employers that an employee did not ask for certificate of service is therefore a fallacy as it is not the responsibility of the employee to seek the same.

(xii) Costs and Interest

The claimant shall be paid her costs by the respondent.

The decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

Dated and delivered in Nairobi this 26th day of January 2015.

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)