



**REPUBLIC OF KENYA**

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

**CAUSE NO. 151 OF 2014**

**DANIEL WAINAINA KAMAU.....CLAIMANT**

**v**

**THE CHAIRMAN, CHURCH BOARDWINNERS CHAPEL INTERNATIONAL,  
NAKURU....RESPONDENT**

**JUDGMENT**

1. Daniel Wainaina Kamau (Claimant) lodged a Memorandum of Claim against the Chairman, Church Board Winners Chapel International, Nakuru on 16 May 2014 and the issues in dispute were stated as
  1. Unfair termination
  2. Notice
  3. Off duties
  4. Public holidays
  5. Annual leave for 3 years 7 months
  6. Housing allowance.
2. After service of Notice of Summons, the Respondent filed a Response on 1 July 2014. The Claimant filed a further List of Documents on 31 July 2014, and the Cause was heard on 8 December 2014.
3. The Claimant filed submissions on 17 December 2014, while the Respondent's submissions were not on file by this morning.
4. After considering the pleadings, documents filed, testimony and the submissions, the Court has identified the issues for determination as, *when the Claimant was employed by the Respondent, whether the Claimant's remuneration included house allowance, whether the Claimant worked overtime, whether the Claimant went on leave during employment, whether the termination of the Claimant's services was unfair and appropriate remedies.*

**When employment relationship commenced**

5. The Claimant pleaded that he was engaged by the Respondent in January 2010 as a driver but was given a confirmation letter dated 1 July 2011.
6. In testimony, the Claimant stated that he was employed by the Respondent as a driver in January

- 2010 at a salary of Kshs 5,000/- which was increased to Kshs 10,000/- per month from 1 July 2011.
7. He further stated that the appointment letter was issued in 2011 after the Respondent's head office in Nigeria sent a Memo asking that the employees reapply for their jobs.
  8. Among the documents the Claimant filed in Court was a pay slip for February 2011, a National Hospital Insurance Fund Data Summary which indicates that he was registered with NHIF and was issued with a NHIF card in 2010, and the name of employer is given as Winners Chapel Nakuru. He started making contributions to the NHIF in October 2010.
  9. The Claimant also filed a National Social Security Fund Provisional Member Statement of Account which indicates that he was employed on 4 October 2008.
  10. The Respondent on its part pleaded that it employed the Claimant from 1 July 2011, and made reference to the letter of appointment and 2 applications for employment written by the Claimant of even date.
  11. Its witness stated that the Respondent started a school in 2011 and because the Claimant had a personal vehicle he volunteered to use it to bring pupils to the school whenever the school vehicle broke down and that after noticing his good work, the Respondent offered him a driver's position in July 2011, and he was issued with an appointment letter.
  12. When the witness was shown a pay slip in the name of the Claimant for February 2011, he stated that it was a forgery.
  13. The Court has looked at the Claimant's appointment letter dated 1 July 2011. The letter states that,

*We are happy to inform you that you are now CONFIRMED PERMANENTLY in the position of Church and School Driver on the following terms having successfully completed your probation.*

14. The letter suggests that there was an employment relationship between the parties prior to 1 July 2011.
15. This letter coupled with the pay slip, application for reemployment and other documents filed by the parties leads the Court to the conclusion that it is more probable that the Respondent employed the Claimant as a driver from January 2010.

#### **Whether the Claimant's remuneration included house allowance**

16. On this issue, the Claimant pleaded and testified that he did not receive house allowance and that the Kshs 10,000/- he was getting was basic pay.
17. The Respondent pleaded and its witness testified that the Claimant's salary was cumulative and included house allowance.
18. The Claimant was not cross examined on the house allowance issue.
19. The formal appointment letter did not clarify whether the Kshs 10,000/- was consolidated or not or whether it included house allowance.
20. It was not suggested that the Respondent provided the Claimant with housing accommodation. The pay slips produced also do not have an element of an allowance for housing.
21. Provision of housing or payment of a reasonable allowance in lieu of housing is one of the basic minimum terms of an employment contract pursuant to section 31 of the Employment Act, 2007.
22. Where an employer intends to pay a consolidated salary inclusive of house allowance, section 31(2) of the Employment Act, 2007 suggests that a provision to that effect should be expressly included in the contract.
23. That was not the case here and the Court finds that the salary paid to the Claimant was not inclusive of house allowance.

#### **Whether Claimant worked overtime**

24. The Claimant contended that he worked Monday to Sunday from 8.00am to 5.00pm (from 5.30am when driving the school bus), and thus worked overtime, and that he also worked during public holidays (driving the pastor or his wife) and that he did not get off duty.
25. In cross examination, the Claimant stated that the school was a day school and that pupils were not going to school during public holidays. Sometimes the pastor's wife would call him from

- home to drive her on errands.
26. The Respondent's witness stated that the Claimant drove the Respondent's van for only one year after which it broke down. He further stated that the Claimant did not work during public holidays, holidays or weekends because there were no pupils to carry.
27. He denied that the Claimant used to drive the pastor or his wife.
28. The formal appointment letter specified the working hours as required by section 10 of the Employment Act, 2007, but also provided that the Claimant should be available during church services.
29. The Court is unable to determine whether the Claimant worked overtime on the basis of material placed before it.

#### **Whether Claimant went on leave**

30. On this issue, the Claimant's case was that he did not go on leave during the tenure of service.
31. The Respondent's case was that the Claimant was paid leave allowances.
32. The statute requires the employer to keep certain records and produce those records in legal proceedings. No records were produced for leave for 2010 or 2011, but a payment voucher for Kshs 15,999/- for 2012 leave was produced indicating the Claimant and a Samuel Maina were paid.
33. The Court therefore finds that the Claimant did not take leave for 2010 and 2011.
34. The Claimant quantified the amount as equivalent to Kshs 24,082/- in the submissions. He would be entitled to the amount.

#### **Whether termination of services was unfair**

##### ***Procedural fairness***

35. According to the Claimant, he received the letter of termination dated 16 August 2013 on 19 August 2013 and that the duration of the notice was less than 30 days. He further asserted that he was not called to a meeting before the termination.
36. The Respondent on the other hand advanced a case that the termination of the Claimant's services was proper and in accordance with the contract of employment.
37. It is not disputed that the Claimant's contract was terminated through the letter dated 16 August 2013. For the sake of clarity, I will quote the whole content of the letter

We write to inform you that, due to our recent review in the administration of the church office, we shall not be needing your services as church receptionist as at 31<sup>st</sup> August 2013. Your terminal dues shall be prepared for you up to the date 31<sup>st</sup> August 2013.

38. The content of the letter leaves no doubt that the Respondent was declaring the Claimant's position redundant.
39. Redundancy is governed by section 40 of the Employment Act, 2007. The section has outlined several conditions to be complied with by an employer.
40. The Respondent did not comply with any of the conditions. The Claimant was not notified in writing one month in advance, the local labour officer was not informed and the selection criteria was not disclosed.
41. It is also not clear why the Respondent referred to the Claimant as a receptionist when its own evidence discloses the Claimant was a driver.

##### ***Substantive fairness***

42. The Respondent did not even attempt to prove the operational reasons that led to the declaration of the Claimant's position as redundant.
43. The termination through redundancy was clearly substantively unfair due to the Respondent's failure to prove the reasons for termination and that the reasons were valid and fair based on its operational requirements.

## **Appropriate remedies**

### ***One month pay in lieu of notice***

44. The Claimant would be entitled to one month pay in lieu of notice pursuant to section 40(1)(f) in the sum of Kshs 10,000/-.

### ***Off duties/Public holidays***

45. The Claimant did not provide the basis for his calculations for these heads of claim in evidence. These are items capable of precise arithmetical calculation.

46. Pursuant to section 49(4)(i) of the Employment Act, 2007, the Court will make provision for these two items under compensation.

### ***Leave***

47. The Claimant admitted that he was paid in lieu of leave in October 2012. He served for 3 years and 7 months. He would be entitled to 2 years and 7 months leave pay.

48. He calculated the same as Kshs 24,082/-. The Court would award him the same as the Respondent has not challenged the calculations.

### ***House allowance***

49. The Claimant sought Kshs 37,500/- under this head of claim.

50. From January 2010 to June 2011, the Claimant's salary was Kshs 5,000/-. Using 15% of that to get the housing allowance, the Claimant would have been entitled to house allowance of Kshs 750/- per month. He would have earned a total of Kshs 14,250/- during the period.

51. Using the same percentage, from 1 July 2011 to termination in August 2013, the house allowance should have been Kshs 1,500/-. During this period of 26 months, the Claimant should have been paid Kshs 39,000/- as house allowance.

52. The total amount the Claimant was entitled to is therefore Kshs 53,250/-.

### ***Compensation***

53. The Court has reached the conclusion that the termination of the services of the Claimant was both procedurally and substantively unfair (through redundancy though the Claimant did not seek severance pay).

54. Considering his length of service, and that the Court has not made an award under off days and public holidays, the Court would award him the equivalent of 10 months gross wages assessed as Kshs 100,000/-.

### ***Certificate of Service***

55. A Certificate of Service is a statutory right. The Respondent should issue one to the Claimant within 7 days from today.

### **Conclusion and Orders**

56. The Court finds and holds that

a) the Claimant was employed in January 2010

b) the termination of the services of the Claimant through redundancy was unfair and awards him and orders the Respondent to pay him

a) One month pay in lieu of Notice      Kshs 10,000/-

b) Outstanding leave	Kshs 24,082/-
c) House allowance	Kshs 53,250/-
d) 10 months wages compensation	Kshs 100,000/-
<b>TOTAL</b>	<b>Kshs 187,332/-</b>

57.The Respondent produced a payment voucher showing the Claimant was paid Kshs 36,667/-. This amount should be deducted from the total award herein.

58.The Claimant to have costs of the Cause.

**Delivered, dated and signed in Nakuru on this 27<sup>th</sup> day of February 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Ngamate instructed by M. Korongo & Co. Advocates

For Respondent Mr. Mugambi instructed by Mugambi Nguthari & Co. Advocates