



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1908 OF 2011

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th October, 2015)

KENYA UNION OF EMPLOYEES OF VOLUNTARY

AND CHARITABLE ORGANISATIONS (KUEVACO).....CLAIMANT

VERSUS

NAIROBI PENTECOSTAL CHURCH:

CHRIST IS THE ANSWER MINISTRIES (NPC-CITAM)..... RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant, Kenya Union of Employees of Voluntary and Charitable Organizations (KUEVACO) filed a Memorandum of Claim on behalf of Beatrice Wanjiru Karuu alias Beatrice Kamau dated 11/11/2011. The Claimant avers that the Grievant was employed by the Respondent on a three year renewable Contract with effect from 15th November, 2007, to November 2009, at a monthly salary of Kshs. 107,044.63. The Grievant's contract was renewed with effect from 15th November, 2009 to 14th November, 2012. The Claimant alleges that the Contract was prematurely terminated by the Respondent on 26th January, 2011, and no reason was advanced by the Respondent for her termination save that she had violated the code of ethics of the Respondent.
2. The Claimant contends that the Grievant was never charged with any offence nor had she ever been submitted to any disciplinary proceedings. She was offered KShs. 453,725.80 as her final dues but she declined to go collect it. At time of her termination there were some other people who had been terminated on the grounds of immorality and the Claimant is of the view that people thought the Grievant was terminated on the same grounds. She was never issued with a Certificate of Service. The Grievant Claims damages for defamation, premature termination and other benefits as listed in the memorandum of Claim.
3. During cross examination the Grievant stated that she now works for Rotary International and is also a consultant for the District Governor of Rotary in Nairobi. She alleges she is not in full time employment. She admitted that in her contract with the Respondent there was a clause providing for one month's notice before contract could be terminated. She also admitted to agreeing to receive a consolidated salary of Kshs. 50,662.00. During the whole time she was in employment she never raised an issue of house allowance.
4. The Grievant alleged that her leave allowance was 12% of her monthly pay and Pastors' retreat allowance was 48% of her monthly pay. She further alleges that she learnt of her dismissal when

it was announced in Church and was therefore not lawfully dismissed.

5. The Respondent filed its statement of Defence on 29th November, 2011, through the firm of B.M. Mutie. The Respondent's witness was its Finance and Administration Manager who stated that she knew the grievant and was familiar with the facts of the claim. She stated that the Grievant was employed by the Respondent as a Pastor in its Ngong branch. The Grievant was appointed on 15th November, 2007, to November, 2009. The said clause had a termination clause which was to effect that any party could terminate the contract subject to one month's notice or one month's salary in lieu of notice. The Grievant was being paid a consolidated salary of Kshs. 50,602.00 which covered basic pay, house allowance and other allowances. Pastoral retreat and book allowance were payable to the providers direct and the grievant never received cash. The Grievant's contract was renewed for a further three years on 1st November, 2009, to 14th November, 2012, with the same terms of the initial contract.
6. The Respondent's witness admitted they invoked the termination clause in the contract and terminated the contract before it expired. The Grievant's terminal dues were calculated by the Respondent and they offered her Kshs. 453,722.63 which she refused to collect. Fuel allowance was given to employees of the Respondent who had a vehicle and it was given through a fuel card. Airtime allowance was also paid and it was taxable. The Grievant never complained about her consolidated salary at the time when she was in employment. The Respondent never said anything adverse in the termination letter and as such never maligned her name.
7. The Respondent denied terminating her by announcement in church. On cross examination the RW1 admitted that the Grievant did not have a certificate of service because she never came to collect it after termination. RW1 did not know the reasons behind her termination. RW1 stated that the Respondent was ready to pay her terminal dues which they had offered her at termination. The Respondent further alleges that the Grievant is not entitled to any of the prayers sought in the Memorandum of Claim.
8. Having considered evidence on record from both parties plus the submissions filed, the issues for determination are as follows:

1. ***Whether there were valid reasons to terminate the Claimant.***
2. ***Whether due process was followed before the Claimant was dismissed.***
3. ***What remedies to give in the circumstances?***

9. On the 1st issue, the termination letter given to the Claimant dated 26/1/2011 stated as follows:

"I write to inform you that after careful thought and consideration CITAM has decided to invoke the termination clause as provided for in your letter of appointment.

Your employment contract with CITAM is therefore termination with effect from January 31st 2011.

Consequently, your terminal dues including gratuity, one month's salary in lieu of notice and payment in lieu of leave will be made to you.

Meanwhile, complete the attached Exit Questionnaire and circulate the Discharge Voucher and return the same to the Head of Human Resource.

We wish to thank you for the time that you have given yourself to the Ministry with CITAM. It is our prayer that the Lord will continue to direct your path and placement in his vineyard.

Yours in His Service....."

10. From this letter, no real reason is given as the considerations CITAM put into consideration as not explained. Section 43(1) and (2) of Employment Act states as follows:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

11. The Respondents didn't give reasons for terminating the Claimant. They contend that they exercised the termination clause in the contract with the Claimant. It is true that the contract of employment had a termination clause whereby either party could terminate the contract after giving 1 month's notice.

12. This in itself did not in my view warrant the Respondent to terminate the contract without valid reasons as the law i.e Employment Act is superior to the contract itself and provides for the bare minimum of what is expected in the circumstances.

13. Section 41 of Employment Act 2007 also provides that:

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

14. ILO Con-158 Termination of Employment Converters, 1982 whose contents have been documented in the Employment Act 2007 provides as follows:

“Articles 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”.

Under Article 7

“The employment of a worker shall not be terminated for reasons related to the workers' conduct or performance before he is provided as opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity”.

15. As provided in both provisions, the Respondent did not have valid reasons to terminate the Claimant and neither did they give her an opportunity to defend herself.

16. It is therefore this Court's finding that the termination of the Claimant was unfair and unjustified

in terms of Section 45 of Employment Act 2007 which states as follows:

“(1) No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove:

- a. **that the reason for the termination is valid;**
- b. **that the reason for the termination is a fair reason:-**
 - i. **related to the employee’s conduct, capacity or compatibility; or**
 - ii. **based on the operational requirements of the employer; and**
- c. **that the employment was terminated in accordance with fair procedure.”**

17. Having found as above, I now turn to the remedies available. The Claimant sought various remedies including leave allowance, pastoral allowance, airtime allowance, food vouchers and fuel allowance. Concerning house allowance, the contract between Respondent and claimant never provided for payment of house allowance but only provides for a consolidated salary of 50,602/=. This salary was later increased as evidenced from the Claimant’s payslip to 63,262.63 (Exhibit J). Did the contract then provide for nonpayment of house allowance?

18. Under Section 31(1) & (2) of Employment Act:

“(1) A contract of service not being a contract to perform

specific work, without reference to time or to

undertake a journey shall, if made to be performed in

Kenya, be deemed to be –

- a. **where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;**
- b. **where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or**
- c. **where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.**

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

19. The reason of the contract talks of a “Consolidated” salary but does not in any way mention whether house allowance is part of this consolidated amount. By being silence, the issue of house allowance is not addressed.

20. I therefore find that the Claimant ought to have been paid her house allowance = 15% of her basic salary being 63,262/=.

1. = $15/100 \times 63,262 = 9,489 \times 38$ months worked

= 360,594.40 - which I award her.

The Claimant also prayed for other allowances promised but not paid including school fees for upto 3 children. This in my view is not payable as fees for children in school and the Claimant admitted that she did not have any child for whom school fees could be paid.

21. Other prayers I award in terms of the contract are as follows:

2. 1 month gross salary in lieu of notice = 9,489/= (house allowance + 63,262 basic salary) = 72,751/=.
3. Leave allowance being 12% of basic salary for 3 years served = 7,591.44 x 3 = 22,774.32/=
4. 12 months salary as compensation for unlawful termination of employment = 12 x 72,751 = 873,012/=

Total payable = **1,329,131/=** less statutory deductions plus costs.

The Claimant should also be issued with a Certificate of Service.

Read in open Court this 29th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jomo holding brief for Ombati for Respondent – Present

Otieno for Grievants – Present