



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 415 OF 2011

BETWEEN

O. K.M. N CLAIMANT

VERSUS

1. THE PRESBYTERIAN FOUNDATION

**2. THE SECRETARY GENERAL OF THE P.C.E.A GENERAL ASSEMBLY.....
RESPONDENTS**

Rika J

CC. Mr. Kidemi

Mr. Kimondo, instructed by Kimani Kimondo and Company Advocates, for the Claimant

Ms. Ndumia and Mr. Okeyo, instructed by Muthoga Gaturu & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Evangelist O.K.M. N filed his Statement of Claim on 18th March 2011. The Respondents filed their Statement of Response on 18th May 2011. The Claimant gave evidence and closed his case, on the 1st November 2012. The Respondents called 3 Witnesses. C G L N gave evidence for the Respondents on 20th May 2013; retired Church Elder J M on 4th July 2013; and Church Minister S M on 3rd December 2013, when the hearing closed. The dispute was last mentioned on 14th February 2014 when the Parties confirmed the filing of their Submissions and were advised Award would be read on notice.

2. The Claimant's position is that he was employed as an Evangelist by the P.C.E.A [*particulars withheld*] Outreach, with effect from 1st June 1994. He was issued a letter of appointment dated 13th June 1994. The letter was followed by another letter of appointment dated 17th October 2001 from the General Assembly, appointing the Claimant to the same position. He became a contributor to Group Allocated Annuity Policy Number [*particulars withheld*], a Policy which set the Claimant's retirement age at 60 years.

3. He obtained a Degree of Divinity from the St. Paul's University in 2007. He lost his wife through sickness on 11th November 2005. This marked the beginning of his problems with some members of his Church. He remarried on 11th August 2007. He had Children from his first marriage. It took time for his first family to reconcile with the second. Some Church members took advantage of these misunderstandings.

4. On 22nd April 2009, he received a letter from the K S, sending him on compulsory leave for 1 month from the date. This was done on the allegation that there was a worrying relationship between the Claimant and his Wife, and problems relating to his Wife and his Son. The period of compulsory leave was extended for 3 months, to end 24th August 2009. No reason was given for the extension. It was malicious, and intended to lay ground for the unfair and unlawful termination of the Claimant's contract of employment. The K S breached its own P.C.E.A Practice and Procedure Manual. The K S convened what the Claimant termed as a Kangaroo Court on 23rd May 2009, purported to hear the Claimant, and on 23rd August 2009, terminated his contract of employment as an Evangelist of P.C.E.A **[particulars withheld]** Parish.

5. He holds termination to have been unfair and unlawful and prays for the following Orders:-

- a. Declaration that termination was unfair and unlawful, and the Claimant is paid by the Respondents, his full arrears of consolidated wages from the date of termination to the date this dispute is determined;
- b. The Claimant to resume his evangelical duties immediately;
- c. 20 months' salary accrued from August 2009 to 31st March 2011 at Kshs. 682,700, plus payment for salaries the case shall remain undecided;
- d. 12 months' salary in compensation at Kshs. 421,620;
- e. 60 days of unpaid annual leave at Kshs. 68,270;
- f. In event the Court does not order for reinstatement of the Claimant, he is in addition, paid 3 months' salary in lieu of notice at Kshs. 102,405; and severance pay for 15 years at Kshs. 518,025- total Kshs. 620,430;
- g. Damages for defamation; and
- h. Interest as the Court may deem fit to grant.

6. Obadiah testified that he was given a job description on employment. He was to work in accordance with the P.C.E.A Practice and Procedure. The K S Clerk was invited by the Claimant's Wife in his capacity as a Church Elder, to the Claimant's home to sort out the domestic misunderstandings. He was accompanied by Reverend N and other men who were not Elders. The situation was exploited by the K S Clerk E G, leading to the letter of compulsory leave.

7. 3 grounds were listed as justification for compulsory leave: the Claimant's worrying relationship with his Wife; the problem relating to his Wife and his Son; and his call as an Evangelist. The letter did not ask him to give his story. He did not participate in any meetings convened by the Respondents after compulsory leave. He is not shown to have been present in any meeting, convened by the Respondents.

8. The letters of termination gave the reasons for termination as the Claimant's negligence of duty and negligence of family. He was not given a chance to defend. He was invited to the meeting, but not allowed to defend. The role of termination is reserved for the Presbytery, not the Kirk Session. He was not aware of any meeting between his Wife and the K S. After termination, his Wife wrote to the K S on 31st August 2009, protesting that it was wrong for the K S to involve itself in family matters and use the

family issue as a stepping stone to achieve selfish interests.

9. After termination, O appealed to the K S. He did not receive an immediate response. He decided to appeal to the Presbytery. The K S replied. The decision was upheld. The Presbytery called the Claimant and the K S for a meeting which took place separately. The Claimant was not allowed to defend himself. The P.C.E.A Practice and Procedure Manual does not give the K S the mandate to terminate an Evangelist's contract of employment. The K S acted illegally and contrary to procedure. The Claimant considered himself still legally in employment. He earned Kshs. 34,135 gross monthly salary.

10. In cross-examination, O testified the K S Clerk went to his house in the evening. The group was invited by the Claimant's Wife. The Claimant was supposed to take his Child to hospital the next day, but had refused to do so. The K S Clerk was invited as a Village Elder, not Church Elder. The 2 men who accompanied him were unknown to the Claimant. E was acting as an Evangelist and getting paid for it. He was exploiting the Claimant's situation. O was against the group communicating with his Wife over the Cell Phone. They did so even at night. The Claimant thought E wanted to take his Wife and his job. O's Wife was not a Member of the P.C.E.A.

11. Evangelists assist Ministers in their duties. O performed his role in accordance with the job description. He received a letter from the Respondents saying he was not carrying out his duties in accordance with his obligations. He responded saying some of the duties he was required to perform were outside the Respondents' Constitution. Two-thirds of the reasons given in justifying compulsory leave were taken from information communicated to the Respondents by the Claimant's Wife.

12. It was up to the K S to evaluate the Claimant's performance. The Session acted on rumours generated by E, who exploited the Claimant's Wife. Since July 2010, the Claimant's Wife went missing. O could therefore not call her to testify. He could not know about the issues discussed between the K S and the Presbytery. The Presbytery advised the Claimant that there were misnomers in the termination of his contract, but that the Church is a body, implying he should not take the matter to Court. He was not paid his terminal dues, but continued to be paid his salary up to September 2009. Redirected, the Claimant testified he had worked for 15 years, and was never warned. Termination is not meant to be a secretive affair. The Presbytery alleged to donate authority to the K S to terminate the Claimant's contract after the act of termination. He was not called either by the Presbytery or the K S to defend himself before the termination. O urges the Court to grant his prayers.

13. The Respondents answer that the Claimant was employed by themselves as an Evangelist as stated in the Claim. He was a contributor in the CFC Life Policy, but there was no term in the contract of employment that the retirement age was 60 years. The K S did not exploit any misunderstandings in the Claimant's family. It got involved in his domestic affairs only at the invitation of the Claimant's Wife. She reported to the S that the Claimant was abusive to her and their Child. A meeting was held between the K S and the Couple on 24th April 2009. He was sent on compulsory leave with full pay, to enable him sort out his family and evangelistic problems. There was no malice on the part of the Respondents. Termination was in accordance with the P.C.E.A Practice and Procedure Manual. The Presbytery gave the K S full authority to handle the Claimant's case in accordance with the Practice and Procedure Manual, in a letter dated 20th October 2010. The Presbytery also held a meeting on 20th February 2010, discussed the Claimant's case and agreed with the decision of the Presbyt. K S. The decision was collectively made, not made by the individual K S Clerk. The decision was not informed by one incident, but by a series of incidents committed by the Claimant, which had led to various verbal warnings culminating in the termination. The Respondents concede the Court has jurisdiction, but disagree that the jurisdiction extends to the claim for defamation.

14. The Reverend G N H testified he has worked for the Respondents in various capacities, from 2004. O worked under H at *[particulars withheld]* Parish. H was the Claimant's immediate Supervisor. The Claimant taught catechism; visited the sick; spoke to the staff; organized devotions; and visited neighbouring schools on evangelization. H supervised Obadiah between the year 2008 and 2009. His performance of duty was wanting. H issued him memos. He was absent when catechism was supposed to be administered. He failed to prepare weekly activities' reports. H raised these shortcomings with the K

S, an Administrative Unit of the Church which employed the Claimant. O was given time to change; there was no change.

15. In April 2009, H was called by the K S Clerk Elder E K G, who reported that the Claimant's Wife, a Member of the Church had called E, and complained of being assaulted by the Claimant. H, E and E's Son proceeded at night to the Claimant's residence. The Wife opened for the group. She told them she had been assaulted by her husband, and locked outside the Couple's bedroom. O was called from the bedroom. Prayers were said, and the group left. They expected the Claimant to conform to his calling as an Evangelist. The Couple visited H's Office 2 days later, where he insisted that his position in the domestic squabble was non-negotiable.

16. The Kirk Session was formally convened to deliberate on the matter. There was a dozen Elders including Church Ministers. The Wife preferred a smaller Committee. 5 persons were chosen from the K S. The Wife explained her position. According to the Minutes of the meeting held on 26th April 2009, the Wife stated:-

- Evangelist O accused her of being funded by other men in her education, transport, and meals.
- He accused her of infidelity.
- He did not buy food for their baby, whom he claimed, was not fathered by him.
- He slapped her when he found her with some teaching materials she had obtained from a conference held in Cameroon on HIV/ AIDS, which had the pictures of female and male condoms. She had been locked out of the bedroom for long spells, and her life had become very difficult.

17. The Claimant was sent on compulsory leave to reflect. On coming back, he was rude by demeanour and words, leaning back on his seat and chewing gum. He was sent away for a further 3 months. It was hoped he would reflect and reform. He returned and informed the Respondents nothing had changed. The Respondents terminated his contract and paid him salary in lieu of notice. There was a relationship, between his work and his family life. He brought the Church into disrepute.

18. Hiuhu testified in cross-examination that he joined *[particulars withheld]* Parish in the year 2008. The incident revolving around the Claimant and his Wife took place in 2009. There were issues with him from the year 2000. The Witness wrote a memo to the Claimant but did not have it in Court. Obadiah was to prepare weekly reports. He was warned verbally. The appendices to the Practice and Procedure Manual, Article 12, states that no one shall be subjected to arbitrary interference with his privacy, family or home. The Elders were called by the Claimant's Wife. They did not go there out of their own initiative. The K S sat on 26th April 2009. H was not sure when the Claimant was sent on compulsory leave. The letter of compulsory leave indicates it was on 22nd April 2009.

19. The minutes of the meeting of 26th April 2009 showed what the Claimant's Wife said, but did not record the Claimant saying anything. H was not part of the smaller Committee. Compulsory leave is an administrative issue. It is not provided for in the Respondents' Practice and Procedure Manual. The Procedure and Practice Manual provided for the discipline of an Evangelist. Removal was through the sentence of the Presbytery, on recommendation of the K S. The Presbytery would confirm. The K S wrote to the Presbytery in 2010 after the Claimant had appealed. It is incorrect to say that the Respondents did not follow the laid down procedure. Dismissal letter was written by the Employer. The Clerk to the K S wrote the dismissal letter. Every time the Claimant was called to a meeting, there was an opportunity to defend. When the matter came before the Presbytery, H stepped out as the issue was discussed.

20. J M C testified he is a retired Church Elder, having served from 1994. He became an Elder in 1995. He was elected Session Clerk in 2004, and knew the Claimant from late 1994. An Elder shepherds and also, helps in the administration and discipline. The Clerk is like the CEO; he handles documents and oversees administration. The Claimant was under Elder C's supervision from 2004. O started well and

gave reports on time. From 2006, he slackened. He showed poor performance. The Session convened and warned the Claimant. His case was addressed by the Session on 19th July 2006. His Minister was asked to talk to him. Members would come for catechism and find the Claimant absent.

21. On 2nd March 2008, the K S wrote to him reminding him of his duties. He improved slightly. In April, the Court met and decided to send the Claimant on 1 month of compulsory leave. Before the month expired, his Wife complained she was having problems with him. The K S convened on 26th April 2009 and called the Couple. The Claimant had accused her of infidelity, and said their baby was not his. She said her life had been made difficult by the Claimant. The K S convened another meeting on 23rd May 2009 and decided Presbytery must be informed. The K S met on 19th July 2009 and decided to terminate the Claimant's contract. The Presbytery was informed and advised the Session to continue counseling the Claimant. The Session sent his terminal benefits to the Presbytery for payment. The Claimant appealed to the K S Clerk after termination. It was decided the termination stands. The Claimant appealed to the Presbytery. The K S was called by the Presbytery as was the Claimant. The appeal was considered and termination decision endorsed. H prepared the Report dated 22nd January 2010 for the Presbytery, affirming the decision of the K S to terminate the Claimant's contract of employment. The Claimant was paid over Kshs. 100,000 as terminal dues.

22. M conceded on cross-examination that there was no evidence placed before the Court indicating the Claimant was paid over Kshs. 100,000 in terminal dues. M started interacting with the Claimant from the year 2004. O was not in full employment at the time; he told M that he was studying. He was in College for half the day. There was no problem with him in 2004/2005. He was to be counseled by the Minister. He was warned severally by word of mouth about his conduct. His Wife made the accusations against him, in his presence. M was not there at the actual sitting. The Claimant was sent on compulsory leave because he was unable to discharge his catechist duties and to give weekly reports. It was not mainly about his Wife. Focus was on evangelism. He was beating his Wife, which injured the Church. It could create a scandal. It was a private family matter, but brought to the fore by the Claimant's Wife.

23. The Church Practice and Procedure Manual said no one shall be arbitrarily interfered with. The Church did not interfere with the Claimant arbitrarily; it merely offered counseling. It followed the right procedure. Clause 14.36 of the Practice and Procedure Manual provided for serious offences by an Evangelist. The Parish Session was supposed to submit a full report of the case to the Presbytery. The Presbytery would give a ruling. The Session did not report to the Presbytery in writing; there was a verbal report made. The K S had authority from the Presbytery. Report to the Presbytery, M confirmed, was after the termination of the Claimant's employment. The Witness closed his evidence, redirected by Mr. Okeyo, with the explanation that the Claimant was sent on compulsory leave for failure to teach catechism. He was not visiting the sick. He was given ample time to change. The Claimant and his Wife were members of the Church, within the jurisdiction of the Church, and invited the Church into their privacy.

24 S M testified he was at the time of his evidence, a Church Minister serving in Nyandarua Presbytery. Before then, he was the Clerk at Nairobi North Presbytery. His role was to coordinate between Parishes, keep records, and keep custody of the Rules of Practice and Procedure. There were 8 Parishes. The Claimant was an Evangelist at *[particulars withheld]* Parish.

25. The Church has Districts and Sessions. Districts have Elders, who are in charge of families. Deacons assist the Elders. The third tier has the Sessions. The Claimant was an Evangelist. A Minister was in charge of the Parish. The Parish Session is the Employer, while Presbytery confirms. The services of an Evangelist are regulated by the Session. Decisions of the Parish Session are taken to the Presbytery for confirmation. The General Assembly serves the whole of East Africa.

26. Once an Evangelist has a problem, the Session meets and listens to the Evangelist. There are quarterly reports forwarded to the Presbytery. The Presbytery advises on what should be done. The Claimant went through all the processes. The Claimant appealed after the decision of the K S. The Presbytery met as shown in the extract of minutes exhibited in the Respondents' Statement of Response filed in Court on

15th August 2011. Mbabu wrote to the Session Clerk J M on 20th January 2010, and informed him the Presbytery had received the Claimant's Appeal. He also wrote on 12th March 2010 to M expressing the Presbytery's concurrence with the termination decision. To terminate or procure the services of an Evangelist is an elaborate process. The Claimant was paid all his terminal dues. *[particulars withheld]* Parish gave a Full Report on Evangelist O's removal.

27. M admitted on cross-examination that the Full Report was made after termination. It was based on M's letter of 20th January 2010. The Respondents nonetheless were not closing the gate after the bull had disappeared. There were letters exchanged before 20th January 2010 between the Parish and the Presbytery. The letters were not before the Court. The Session paid his salary; it was not paid from the Presbytery. The Session paid to the Presbytery, which in turn paid the Employees. The Practice and Procedure Manual is a very serious document which guides the Church in Management of its Staff. The Evangelist is under the supervision of the Minister. Clause 14.36 states that after the Appeal, if the Evangelist appeals, the Presbytery may intervene after a decision by the K S. The Evangelist is supposed to be deposed by the K S. This was the procedure followed by the Respondents. The Parish is supposed to recommend removal, while the actual removal is by the Presbytery. The Parish wrote the letter of termination, deriving its authority from the Presbytery. The Church had its own mode of communication. O was heard before a closed Court, prior to termination. He was secondly heard by the Presbytery on appeal. He was not allowed in the Presbytery meeting. The persons who sacked him were allowed in the meeting. The minutes recording this meeting did not show if the Claimant was given an opportunity to state his Appeal. As far as M was concerned, the Practice and Procedure Manual was followed. The Respondents urge the Court to dismiss the Claim.

The Court Finds and Awards:-

28. This dispute is a grave indictment on the efficacy of P.C.E.A's internal dispute resolution mechanisms. It is not proper, that Religious Institutions bring their internal disputes before Secular Institutions. This is more so, given that the Constitution of Kenya has recognized Alternative Dispute Resolution Mechanisms under Article 159 (2) (c). The Bible also, has several verses, which encourage the Church to resolve its disputes internally. Among these verses are:

- Matthew 5:25- *“If someone sues you, come to terms with him quickly, while you are on your way to the Court, or he may hand you over to the Judge, and the Judge to the Officer of the Court, and you may be thrown to jail.”*
- 1 Corinthians 6: 1- *“Does any one of you, when he has a case against his neighbour, dare go to law before the unrighteous and not before the saints? Or do you not know that the saints will judge the World? If the World is judged by you, are you not competent to constitute the smallest Law Courts?”*
- 1 Corinthians 6: 5- *“I say this to shame you. Is it possible that there is nobody among you, wise enough to judge a dispute between believers?”*

29. There is need for Parties, and in Particular Religious Institutions, to embrace out-of-court dispute resolution. The Honourable the Chief Justice of Kenya Dr. Willy Mutunga has been at the forefront of urging Kenyans to embrace the wide range of possible voluntary dispute settlement mechanisms. In his address to the Cohesion and Goodwill Ambassadors on 29th August 2010 at Crowne Hotel Nairobi, the Chief Justice observed:

“ Every time the words ‘see you in Court’ are uttered, we acknowledge there is a total breakdown in a relationship, that can only be righted by an authoritarian decision favouring one side...”

He went on to submit that, the Holy Books teach us that we can negotiate on anything, and even negotiate with God, as Abraham did over the destruction of Sodom, and Prophet Mohammed did over the number of times a Faithful should pray in a day, reducing the number from Allah's proposal of 50 times,

to 5 times currently in use.

30. What the Scriptures and the Chief Justice state above, is not different; it is the same message, communicated differently. Not all disputes are suitably resolved in Secular Courts. A bad out-of-court settlement may be better than a good, authoritarian, court-imposed decision, because as observed by the Chief Justice, Court decisions only have one winner, and break, rather than rebuild relationships. While other Parties may be slow in adopting voluntary settlement, Religious Institutions must lead the way, as they are firmly rooted in this creed of voluntary settlement. If they cannot resolve their internal disputes, how shall they resolve external disputes, and make peace among the non-believers?

31. The Claimant was employed by the Presbyterian Church of East Africa **[particulars withheld]** Outreach as an Evangelist, commencing 1st June 1994. His letter of appointment was signed by the Session Clerk. He was designated as an Outreach Evangelist responsible for congregations in K, N, S and K Police within Nairobi. He earned a gross monthly salary of Kshs. 2,280.

32. He was reappointed as an Evangelist Outreach by the P.C.E.A office of the General Assembly, in a letter dated 17th October 2001. The effective date of reappointment was 1st October 2001. His salary was readjusted to Kshs. 3,010 per month.

33. His relationship with his Employers was regulated by the two Contracts of Employment and the Practice and Procedure Manual of the P.C.E.A. He worked diligently, and studied for a Bachelor of Divinity Degree at the St. Paul's University, graduating in 2007. He was last stationed at **[particulars withheld]** Parish.

34. Although he says that he was supposed to work up to the age of 60 years, there is nothing in his Contract or the Practice and Procedure Manual, which was brought to the attention of the Court, placing the mandatory retirement age at 60 years. The CFC certificate of participation dated 31st December 2008 did not show any date of retirement. It merely shows the Claimant's accounts as of 31st December 2008, under the Group Allocated Annuity Policy. It is not in any event, a contract of employment regulating the retirement of an Evangelist. It is safe to assume that the Claimant was working under an indeterminate contract of employment.

35. Obadiah was sent on compulsory leave for 1 month, from 22nd April 2009 to 22nd May 2009. The reasons for this administrative leave were given by the Respondents to be:-

- 'The worrying relationship between you and your wife.'
- 'The problems relating to your Wife and your Son Samuel'
- 'Your call as an Evangelist.'

36. The administrative leave was extended by the Kirk Session to 24th August 2009. The letter extending compulsory leave, dated 25th May 2009, does not give express reasons for extension. It however indicates that the Claimant, subsequent to being sent on the initial compulsory leave, reported to the K S concerning his letter of the compulsory leave. The evidence of the Reverend N H was that the Claimant reported to the K S, was expected to show remorse and willingness to reform, but was rude in his demeanour and words, leaning back on his chair and chewing gum. Extension was on the ground that the Claimant had not shown a willingness to change.

37. On 18th August 2009, the K S terminated the Claimant's services as an Evangelist, effective from 23rd August 2009. It was stated by the K S that "..... On 24th June 2009, we were informed your bad conducts and behaviours by your wife in your presence. We gave you April 2009 month compulsory leave with full salary and allowances to sort out the following issues:

- i. Negligent of duties.
- ii. Negligent of your family which is contrary to your calling and status in the Church."

The language does not flow, but the message is clear that the Respondents terminated the Claimant's contract, on the ground that he had neglected his evangelical duties and neglected his family. Both grounds appear in the mind of the Respondents to have been related, and in their totality amounted to '*bad conducts and behaviours.*' These reasons must be seen together with the reasons given by the Respondents to the Claimant, on sending him on compulsory leave, captured at paragraph 35 of this Award.

38. Under Section 43 and 45 of the Employment Act 2007, the Respondents must show that they made their decision to terminate the Claimant's contract for valid reason or reasons. Section 41 of the Employment Act 2007 prescribes the minimum procedural standards in all cases of employment termination. The Employee must be explained to the charges against him, in a language understood by him. He must be given an opportunity to make his representations. His Co- Employee or Trade Union Representative accompanying him at the hearing, must be allowed to give their representations if they so wish, before the Employer takes a decision on the Employee on charges arising out of misconduct or poor performance. During the hearing, he is allowed the company of a Workmate, or a Shop Floor Trade Union Representative of his choice. The substantive and procedural standards in the Statute are minimum standards, which must be read over and above the standards given in the contract of employment and the other quotidian practices and procedures regulating the employment relationship. If the Court is persuaded the Respondents did not discharge their statutory and contractual obligations in terminating the Claimant's contract, it must proceed to consider remedies available to the Claimant under Section 49 of the Employment Act 2007, and Section 12 and 15 of the Labour Institutions Act 2007, the applicable substantive law at the time of the termination.

Substantive Justification

39. The two reasons given in justification of the termination were that: the Claimant was negligent of duties, and negligent of his family which was contrary to his calling and status in the Church.

40. The allegation relating to the Claimant's treatment of his Wife and Son do not seem, in the view of this Court, valid reasons to warrant termination. His Wife wrote a lengthy letter to the K S Clerk dated 31st August 2009, annexed to the Statement of Claim as annexure 'OKN8', explaining that she had called Elder E K G to her house to offer pastoral counsel to the family. She had not invited him in relation to a Parish Employee [her husband the Claimant]. She lamented that the Elder and his colleagues lacked sincerity, and used the family issue as a stepping stone to achieve self interest.

41. Although Mrs. N was not available to testify, her letter was not seriously discounted by the Witnesses who gave evidence for the Respondents. The letter of the Claimant's wife was mentioned in her Advocates' demand Letter to the Respondents, dated 30th August 2010. A Copy of Mrs. N's letter was actually forwarded to the Respondents through her Advocates' demand letter.

42. In their letter of response through their Advocates, the Respondents did not deny receipt of Mrs. N's letter, or deny the correctness of its contents. Instead, the Respondents appear to have diverted from the issue relating to the Claimant's family, and the Claimant's Wife's position on the issue. The Respondents now took the position that the Claimant was mainly removed from his role for poor performance; the allegations by his Wife that he was not a good husband, were an additional consideration.

43. The Court has not seen any clear evidence from the Respondents, which would amount to poor performance on the part of the Claimant, in the discharge of his role. There is no specific evidence of evangelical targets, and performance appraisal, that would lead to a conclusion of poor performance. There were no written warnings on poor performance or negligence of duty. The evidence of S M was that in case an Evangelist had problems, the K S would meet, and listen to him. Quarterly Reports of such meetings would be forwarded to the Presbytery. Not a single Report alluding to poor performance or negligence of family with regard to the Claimant, is shown to have been submitted to the Presbytery by the K S, prior to the year 2010. In other words, there was no Report to the Presbytery, of poor performance or negligence of family, during the time the Claimant was actively in employment. The Practice and Procedure Manual contemplates written communication, not oral tradition, in dealing with

the discipline of an Evangelist.

44. Article 12 of the Appendices to the Respondent's Practice and Procedure Manual on Human Rights states:

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks."

In light of this Article, the Respondent's Elders ought to have trod very carefully in responding to the invitation for pastoral counseling. They seem to have overstepped their pastoral mandate, and acted in breach of Article 12, particularly if the letter from Mrs. N to the K S is taken into account. The Claimant testified in his cross-examination, and this was not contradicted by the Witnesses for the Respondents, that the Elders led by E would call his Wife on her Mobile Phone even at night, something he was against. He thought Elder E desired to have his Wife and his job. This evidence strongly suggested that the Elders did not enter the Claimant's house on a purely pastoral purpose; there was an interference driven by improper motive, which was contrary to Article 12.

45. Even when the K S purported to meet and discuss the Claimant's mistreatment of his Wife, the Minutes do not capture anything said by the Claimant; it is just what his Wife reportedly said to the K S that is captured in the Minutes of the K S dated 26th April 2009. Although this is also a matter of fairness of procedure, it highlights the lack of good faith on the part of the K S in its pursuit of the Claimant's family dispute.

46. The Court is not satisfied that the Respondent had valid reason or reasons to justify the termination of the Claimant's contract of employment.

Procedural Fairness

47. The Practice and Procedure Manual has elaborate procedural guarantees on removal of an Evangelist from Office. It mirrors the minimum disciplinary procedures set under the Employment Act 2007. The Manual defines conduct open to Church Discipline as offences committed against the society; offences of heresy; scandalizing the Church; and offence relating to marriage. Neither the letter sending the Claimant on compulsory leave, or the one on termination, give any specific offence and clause, under which the Claimant was investigated and found guilty of, under the Manual.

48. Among the disciplinary measures under the Manual are counseling; admonition; rebuke; suspension from Church privileges and from Office; removal from the roll of communicants; excommunication; and deposition from Office. The Respondents' evidence suggested the Claimant was not performing his work as per his job description. He was called several times and warned. It is not clear if the warnings by the K S were in the form of any of the afore-stated disciplinary measures. Up to the time the Claimant was sent on compulsory leave, there is no express evidence that the Respondents counseled, admonished or rebuked him. Compulsory leave was on 22nd April 2009 to last for 1 month. This was extended by 3 months on the ground that the Claimant had shown no remorse. There was no evidence of the meeting where the decision to extend compulsory leave took place, and no material to show reasons for extension. The Respondents merely stated the Claimant reported to the Elders chewing gum, and rocked on his chair. This was the evidence of lack of remorse. There was no indication that the Claimant was asked about having sorted out the issues that had been listed in the initial letter of compulsory leave, or whether his Wife and Son had been in contact with the Elders after he was sent on compulsory leave, and confirmed there was no change. G L N H who supervised him referred to a Memo he issued the Claimant at one point, which was not availed to the Court. He conceded there was no express warning. J M similarly confirmed that the Claimant was warned before termination. There was no clear evidence of counseling, admonition or rebuke before deposition from Office. The Respondents' Witness almost invariably, justified the absence of employment records on oral tradition. What would be the purpose of the written contracts and the written Practice and Procedure Manual, if the employment relationship was to be regulated entirely by an oral tradition?

49. J M testified that the K S did not arbitrarily interfere with the Claimant and his family; it merely counseled him. He also testified that the Church Court met in April 2009, and decided the Claimant be sent on compulsory leave. Clause 14.31 requires cases which cannot be dealt with through counseling and admonition to be reported to appropriate Church Court. There was no demarcation of counseling and admonition on the one part, and the intervention of the Church Court on the other part, in the case of the Claimant.

50. Striking is Clause 14.36 of the Manual which states that:

‘‘ If a serious offence is proved against an Evangelist, a full report of his case shall be submitted by the Parish Session to the Presbytery, which may depose him from Office, and withdraw his certificate. The Parish Session shall suspend judgment until the Presbytery has given a ruling.’’

J M conceded on cross-examination that the Parish did not report to the Presbytery in writing; it made a verbal report under this Clause. The other Witness S M on his part alleged that the Presbytery could intervene after the Claimant lodged his Appeal

51. In the view of the Court the Parish could not take a decision to terminate the Claimant’s contract without having submitted a full report to the Presbytery. There would be no valid decision made by the Parish, before the Presbytery had received the full report; any action by the Parish would have to remain suspended until the Presbytery made a ruling. It was not for the Claimant to appeal to the Presbytery; the intervention of the Presbytery was one of the steps validating the proceedings and decision of the Parish, and came without an invitation to the Presbytery through an Appeal filed by the Claimant.

52. The K S appears to have been aware of these procedures, and realized it had made a mistake, but went about undoing this mistake, in a most unconvincing and amateurish way. The full report of the deliberations of the K S to the Presbytery is dated 22nd January 2010. Termination was on 18th August 2009. The Claimant had written an Appeal to the K S on 31st August 2009 and appealed to the Presbytery on 19th October 2009. He had already received a response from E K G on 30th October 2009, stating the K S had rejected the Appeal. The Presbytery invited the Claimant and the K S Officials for a meeting on 12th November 2009. No formal hearing took place at the Presbytery, the Claimant and his K S Brothers having engaged with the Presbytery separately on the day they were supposed to be heard. The full report of the K S came after all these procedural steps had been exhausted, and it was therefore apt for the Claimant to feel the K S was closing the door after the bull had bolted.

53. The Presbytery Clerk the Reverend S M wrote to the Session Clerk on 20th January 2010, allegedly giving the Session authority to deal with the matter conclusively. This was rather strange, coming after the Claimant’s contract had been terminated, appeals made, and thrown out. It was an amateurish gimmick by the superior body the Presbytery, to authorize the K S to deal with the Claimant months after termination, and even after Presbytery had purportedly heard the Claimant on appeal on 12th November 2009. It was the Presbytery Clerk, who asked the Session Clerk to submit the full report in this letter, after termination and appeal decisions, which went against the Manual Clause 14:36. The actions of the Presbytery were geared at assisting the Parish in cleaning up its act, and be able to recruit a new Evangelist for the P.C.E.A. **[particulars withheld]** Parish, without much fuss. On 12 March 2010, S M revealed this when he wrote to the Session Clerk, advising the Presbytery concurred with the decision of the Parish, and Okaying the recruitment of a new Evangelist. Although the Presbytery had an opportunity to correct the mistakes of the K S, by reinstating the claimant and insisting on the lower body to follow the correct procedure, it exercised its oversight role in the wrong way, endorsing the blatant disregard of the Manual by the K S, and violating the procedural safeguards that were meant to be accorded to the Claimant under the Manual and the Law. ***The Claimant is granted a declaration that termination of his contract of employment was unfair and unlawful.***

Other Remedies

54. The Court is satisfied that the Respondents failed to demonstrate valid reason, or reasons for

termination and did not adhere to fair procedure in carrying out their decisions. Termination was therefore unfair, and the Claimant is entitled to a remedy contemplated by Section 49 of the Employment Act 2007 and Section 12 and 15 of the Labour Institutions Act 2007, in force at the time of termination.

55. The Court does not think it would be reasonable or practicable, for the Claimant to resume his evangelical duties at the P.C.E.A. A considerable period of time- almost 5 years has lapsed since he left employment. He may not find the work environment hospitable and welcoming, given that both the Parish and the Presbytery were united against him at the time of termination. There is little chance that the Claimant could be reunited with the Respondents, rebuild an employment relationship based on mutual trust, confidence, forgiveness and respect, given the poisoned atmosphere under which the Claimant exited, and the long period of time that has passed from the date of termination. The prayer for reinstatement is refused.

56. Without an order for reinstatement, a grant of back salaries from the date of this Award to the date of termination would have no justification. The Claimant has not rendered any duties from the time of termination. The prayer for consolidated salaries from the date of termination to-date is rejected. Back salaries are paid only where the Court orders restoration of the contract of employment.

57. There is no ground likewise, to accede to the prayer for arrears of salary for 20 months, accrued from August 2009 to 31st March 2011. Prayer [a] and [c] of the Claim are replicated, and relate to payment of back salaries.

58. The claim for 12 months' salary in compensation is merited, given the finding that the Respondents breached the Claimant's substantive and procedural guarantees. ***The Court allows compensation at the rate of Kshs. 34,135 x 12 = Kshs. 409,620.***

59. There is no record of the Claimant's annual leave, made available to the Court by the Respondents, to contradict his assertion that he was owed 60 days of annual leave, at the time of termination. ***The claim for Kshs. 68,270 in annual leave pay is allowed.***

60. The Claimant seeks 3 months' salary in lieu of notice. His contract of employment did not provide for notice or notice pay. ***He is allowed 1 month salary in lieu of notice in accordance with Section 35 [1] [c] and 36 of the Employment Act 2007 at Kshs. 34,135.***

61. There was some evidence that the P.C.E.A had a Group Allocated Annuity Scheme, under which the Claimant was member number 53314. The Scheme was operated by CFC Life. He claims severance pay. Severance would be payable under Section 40 of the Employment Act 2007, in cases of redundancy. The Court understood the Claimant to be seeking service pay under Section 35 [5] of the Act. This would however not be available to him by virtue of Section 35 [6], considering the Scheme put in place by the Respondents. The claim for severance or service pay is declined.

62. There was no case established by the Claimant that as a result of the actions by the Respondents, his employability suffered. The Court would have jurisdiction to grant general damages under the Labour Institutions Act, if there was clear evidence that the Claimant's worth in the evangelical field was devalued through the words and decisions of the Respondents, to the extent that he can no longer find a similar or comparable ready job in the market. He holds a Degree in Divinity, was relatively youthful and in robust health on the date of termination, and is not completely shut out of evangelism. The words he complains about were attributed to his Wife. There was a problem in the Claimant's family, his Wife invited the Elders into the family's life, and certain words and actions followed. She explained that the Elders manipulated her family situation to remove her husband from Office. She did not deny originating the information which was manipulated by the Elders, or deny the correctness of the information in her letter of 31st August 2009, and even in a simple claim for defamation, it would be hard for the Claimant to lay it on the Elders. It is not enough in employment disputes to claim damages out of bare defamation, to merit consideration of damages; the Claimant must show the employment decision materially affected his employability. The Claimant made a bare assertion about defamation. He does not merit separate damages from the compensation granted under paragraph 58, for defamation.

63. In all, the *Court Awards*-:

[a] It is declared the Claimant's contract of employment was terminated unfairly;

[b] The Respondents shall pay to the Claimant within 30 days of the delivery of this Award, 12 months' salary in compensation at Kshs. 409,620; 60 days of annual leave at Kshs. 68,270; and 1 month salary in lieu of notice at Kshs. 34,135- total Kshs. 512,025; and,

[c] No order on the costs and interest.

Dated and signed at Nairobi this 23rd day of May 2014

James Rika

Judge

Delivered and signed at Nairobi this 26th day of May 2014

Nzioki Wa Makau

Judge