



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 980 OF 2010

(Before D.K.N. Marete)

LABAN KITHOKOI.....CLAIMANT

Versus

**AFRICA INLAND CHURCH, KENYA ZIWANI DISTRICT CHURCH COUNCIL
....RESPONDENT**

JUDGEMENT

This matter is brought to court by way of a memorandum of claim dated the 20th August, 2010 and filed on 26th instant. It does not outrightly display the issue in dispute on its face but this indeed, as derived from the claim, is termination of employment of the claimant by the respondent by way of summary dismissal on 20th January, 2010.

The respondent denies the claim vide a memorandum of reply dated 9th September, 2010 and prays that the same be dismissed with costs.

The claimant's case is that on 8th May, 1996, he was employed as an Assistant Pastor by the respondent, African Inland Church (AIC), Nairobi Regional Church Council. On 27th May, 1996 he signed the letter of offer and acceptance of employment. On 28th May, 1996 the AIC, Nairobi Regional Church Council posted him to AIC, Kayole West. Thereafter, on 22nd December, 1997, he was posted to AIC, Mathare under the respondent's command.

On 24th December, 1997, the AIC, Kenya Nairobi Regional Church Council wrote confirming that it had granted autonomy to all District Church Councils under the Church with effect from 1st January, 1998. Other posting for the claimant by the respondent are;-

- 10th November, 2000 – AIC – Ziواني Local Church
- 25th August, 2004 – AIC, Mlango Kubwa
- 31st August, 2006 – AIC, Ziواني

On 13th September, 2004, the claimant wrote to the respondent's council challenging the transfer from AIC, Ziواني to AIC, Mlango Kubwa on ground of irregularity whereupon on 31st August, 2006, the claimant was again transferred from AIC, Mlango Kubwa to AIC, Ziواني as Assistant Pastor.

This was a swap transfer with Rev. Francis Mua. The claimant was prevented from partaking the transfer to AIC, Ziواني until the 21st September, 2007 when the respondent purportedly transferred him to AIC,

Eastleigh. This was resisted but the respondent forced it onto the Eastleigh Community. The respondent therefore heaped blame on the claimant for this fracas and wrongly and unfairly set him on three months compulsory leave thus denying him an income of Ksh.72,675.00. He (Claimant) on 20th November, 2007 wrote to the respondent explaining the Eastleigh situation whereupon he was invited to a meeting with a view *to reflect, discuss and review* the services and work at AIC Runda.

At this meeting, the claimant was accused of raising issues on salary delay and on 18th December, 2009 the respondent sent him on 30 days annual leave which had not been requested for. He appealed against this vide a letter of 23rd March, 2010 and on 17th June, 2010 the respondent wrote purporting to summarily dismiss the claimant from employment with effect from 1st July, 2010.

The claimant deems the termination abuse of the respondent's terms of service and conditions for Pastoral, Quasi-Pastoral and Non-Pastoral staff and the church's constitution. This was also irregular, wrongful, in bad faith, malicious and in contravention of labour relation exercises. This has occasioned loss, damage and deep psychological torture. The claimant has suffered unfair treatment, special loss and dangers as follows:-

31. The Claimant has suffered unfair treatment in the hands of the Respondent's Chairperson and the Respondent herein including but not limited to delay in salary payment, non-remission of deducted share contributions and deductions made to repay loans; and, refusal by the Respondent to settle the Claimant's medical bills as particularized hereinbelow:-

PARTICULARS OF SPECIAL LOSSES/DAMAGES

Unremitted deductions towards SACCO Shares - Kshs.333,776.86

Medical bills as at June, 2010 - Kshs.37,000.00

Pay for period of wrongful compulsory leave - Kshs.72,678.00

TOTAL -Kshs.443,454.86

and also future earning all amounting to Ksh.15,139,224.00 which the respondent has refused to make good despite demand and notice of intention to sue. The claimant prays as follows;-

1. *The claimant prays for judgment against the Respondent for:-*
 - a. *A Declaration that the decision by the Respondent purporting to terminate the Claimant's employment herein is unfair, contravene the Respondent's Terms of Service and Conditions for Pastoral, Quasi-Pastoral and Non-Pastoral Staff and the Church's constitution, is invalid, unlawful, null and void.*
 - b. *The Claimant be reinstated to his position of employment with the Respondent with all attendant rights and privileges.*
 - c. *Kshs.443,454.86*
 - d. *Costs*
 - e. *Interest on (c) and (d) above at court rates until payment in full.*
2. *In the alternative, the Claimant prays to be compensated as follows:-*
 - a. *Kshs.15,582,678.86*
 - b. *Costs*

c. *Interest on (a), (b) and (c) above at court rates until payment in full.*

3. *Any other or such further relief as this Honourable Court may deem just and fair to grant.*

The respondent's case is that the termination of the claimant was justified and that this was a consequence of gross misconduct on his part during his entire term of service and failure to reform and repent even when the respondent gave him numerous opportunities to make good his conduct. The dismissal is therefore lawful and the claim should therefore be dismissed with costs. This is illustrated by the respondent's defence as hereunder.

At an executive committee meeting of Ziwani District Church Council there were issues touching on elder's grievances and relating to the claimant as follows;

7. *The pastor is secretly letting out LCC secrets to the congregation where he portrays the Elders as the bad boys and himself as the good boy. This has brought division in the Church.*

8. *The Pastor's behavior towards women is unbecoming. He associates with only a clique of women which he visits often despite that all his visits are financed by the Church for the benefit of all.*

9. *The Pastor is openly attacking the Elders from the pulpit.*

10. *The Pastor is not transparent/truthful in many matters. He told women leaders coming for a meeting at Ziwani to go and say that they did not know where their Chairman was.*

11. *The Pastor against the laid down policy is baptizing people who have not gone through Catechism.*

12. *The Pastor is misusing Church funds by bringing many expense requests on Sundays. The result is that the Church is not submitting to the DCC all offering and tithes as laid down. The Elders were however divided on the issue of misuse of funds.*

The Chairman then invited the Pastor to give his grievances.

Ultimately, the meeting resolved to transfer the claimant in order to save the Church and the Pastor and also post a more mature Pastor to the Church in order to unite the congregation.

Further, by a letter dated 7th October, 2004 the claimant received a warning letter from the Secretary, Ziwani District Church Council which raised the following complaints against him,

1. *Your utterances to the A.I.C. Ziwani congregations (three services) about your transfer letter for which you said was confusing and irregular and which you said had not come from the rightful authority- incitement.*
2. *That there was no one for you to hand over to while you knew there were other pastors and the L.C.C. who were ready to be handed over to whatever church properties were at your disposal.*
3. *You were considered to have absconded from duty when on Sunday September 26, 2004 you were seen at A.I.C. Ziwani where you worshipped and behaved as though you were still pastoring there whereas on Sunday, September, 19, 2004 you had become the Pastor in-charge of A.I.C. Mlango Kubwa through the posting done by some D.C.C. officials.*

In a letter to the Chairman and Executive Committee, Ziwani D.C.C. dated 1st October, 2007 the following adverse communication was made regarding the claimant,

We have served with Rev. Laban Kithokoi in A.I.C. Mlango Kubwa for sometime and it is our humble

request that the DCC should reconsider sending him to this new church. We recommend the DCC instead post a more mature Pastor. This church is growing and needs to be grounded on sound doctrine.

The following are some of our observation regarding Rev. Laban Kithokoi which in our opinion makes him unsuitable for this posting

- 1. Rev. Kithokoi is proud*
- 2. Lack of commitment to service – usually available only on Sundays during service and usually comes late even for that.*
- 3. Lack of financial transparency – likes to be the one to execute any projects with financial implications to the exclusion of the relevant committees*
- 4. In-subordination – has no respect to the local church council*
- 5. Questionable morals – inappropriate relationships with ladies. An embarrassing case to the church while in Mlango Kubwa was reported at Pangani Police Station.*

Our recommendation is that Rev. Laban Kithokoi should be posted as an assistant pastor to serve under a senior and mature Pastor who will be his mentor.

The letter ended with the following remark, a sign of good faith on the part of the author,

We hasten to add that despite that above weakness and we all have, Rev. Laban Kithokoi is good in project conception and implementation...

In another instance, and vide a letter dated 25th January, 2009 referenced Compulsory Leave and Warning Letter these accusations came out as follows;

The leadership in this church accused of incitement and cheating among other issues and you appeared before the D.C.C. Executive Committee on December 10, 2009 to answer the same accusations.

The Executive Committee advices you to stay on extended leave until when you will be communicated to and advised otherwise.

In an apology by the claimant dated 20th November, 2007, he comes out as follows;

Having gone all through that torment & torture psychologically, I tried all I could to be neutral & courageous so as to save my skin but on the process I failed you people. In fact I was praying for that cup to by pass me as I was shedding internal tears.

Brethren I have.....and you also did not understand meFORGIVE ME, I DID NOT INTEND TO HURT YOU.

Please note before all.....people of Eastleigh were considering me as to their spiritual father because I was the Pastor i/c of A.I. M/Kubwa when we were opening the church & they always desired to keep in touch with me. Finally I am requesting you kindly to be sensitive about my situation. For the last one year I was not posted to any church and this has really tortured and tormented me psychologically because you all know servants of God who are truly called by God get fulfillment and satisfaction when serving God fully.

It ends as follows;

Remain in peace and once again note that I AM SORRY about anything I have or not done contrary to your expectations, otherwise we are all brothers in Christ and life must continue.

Other issues arise out of a meeting of Ziwani D.C.C. Executive Committee on 22nd November, 2007 where the following discussion was held under Minute 03/11/2007;

The Pastor (Rev, Kithokoi) had seen the D.C.C. chairman and sought forgiveness for his conduct at the Eastleigh church on Sunday November 11, 2007, the day the D.C.C. had taken him there to become the first D.C.C. employee in-charge of this church which had since been elevated to a L.C.C. status.

The Chairman said that he had not promised him anything as the decision to discipline him had been taken by the D.C.C. Executive Committee after these events.

On 8th May, 2008 at another meeting of the Executive Committee Ziwani D.C.C. the following observations were made and minute 03/05/08;

Rev. Laban Kithokoi matter was discussed at length as to where he would be posted. A decision was taken to A.I.C. Runda to go and work as an Assistant to Pr. Stephen Musyoki temporarily. His letter of apology which is filed in the D.C.C. Office of was ready out to the committee before the discussion about his pending issues. His apology confirmed in the letter was accepted. He would later be taken to Eastleigh section III as the pastor in –charge as soon as the administrative issues there were sorted out. It was agreed that he be taken there on Sunday May 18, 2008 by the D.C.C. Chairman who would be able to adjust and attend this occasion.

Further, and due to the consistent problems surrounding the claimant's conduct, the following decision was taken at a meeting on 17th December, 2009 by the Executive Committee, Ziwani D.C.C.;

Rev. Laban Kithokoi to take one month's leave while his issues are being sorted out. There was a brief reflection on these issues on Rev. Kithokoi as it appeared that it would be hard for both him and Pr. Musyoki to continue working together at A.I.C. Runda,

and also MIN:03/12/2009 – A.I.C. RUNDA

Rev. Kithokoi attended the Executive Committee meeting as he had been invited to come on Thursday, December, 10, 2009 and respond to the accusations against him by the Pastor in-charge that he was not committed to the work of God in this church.

He had been reported of coming late almost every Sunday as late as 11.00 a.m. or there after, he was also accused of inciting some members to go against the church's leadership and also not being keen in attending L.C.C. scheduled meeting among others.

Rev. Kithokoi on being given the opportunity by the D.C.C. Chairman to respond to all these issues denied them all and accused Pr. Musyoki who was in attendance for cheating the Executive Committee on all the said matters.

The Chairman and other committee members put interventions between the two pastors who most of the times were bitter in their speeches concerning their relationships at their working station A.I.C. Runda.

They almost covered the discussion concerning the church with personal and family issues. The Pastor in-charge Stephen Musyoki remained categorical that since the posting of Rev. Kithokoi to his church, it has not progressed in any way for which his assistant Rev. Kithokoi returned the blame to him saying that he had mixed his family affairs with that of the church.

There was total denial of all the questions the D.C.C. Chairman put forward to Rev. Kithokoi which included all alleged statement earlier the church that he had not been paid for 3 months.

On meetings attendance he said that he had apologies for the ones he had not attended. Pastor Musyoki said that he could remember Rev. Kithokoi attending only one or two meetings since when he was posted to A.I.C. Runda on Sunday, May 18, 2009 to date for which Rev. Kithokoi said was false information.

There were open accusations that Rev. Kithokoi had joined the Pastor in-charge brother in-law who has since been removed from the church fellowship and services to frustrate pastor Musyoki's endeavors in making the church grow. This had also affected the latter's family stability harmony which Pr. Musyoki said it had been affected him personally.

Rev. Kithokoi left the sitting after informing the committee near the end that he and pastor Musyoki had reconciled all these issues before a full council and agreed to work together harmoniously.

He apologized before leaving for any misconduct he could have shown the chairman and the committee when responding to the questions put before him.

Other observations and issues on the claimant are in a letter dated 22nd December, 2009 and addressed to the chairman AIC, Ziواني DCC and authored by the LCC, Secretary, one, Charles M. Mutuku as hereunder;

REMOVAL OF REV. LABAN KITHOKOI

In reference to the meeting held on 13th December 2009 held between AIC Ziواني executive committee and AIC Runda Court Clerk (Elders), we openly and honestly told you of all what we had against Rev. Laban Kithokoi as listed below, and expressed our fears and concerns of his overstaying at AIC Runda may cause more damage and this will not be for the good of the small church, and the DCC in general.

- 1. According to your DCC letter dated 9th May 2008, the posting of Rev. Kithokoi is temporal and his overstaying is causing serious problems.*
- 2. Rev. Laban Kithokoi has been inciting the church against the Local church and the DCC leadership. (Referenced 1/11/2009-15/11/2009)*
- 3. Rev. Kithokoi promised members of the church job opportunities this later turned to be false and this has damaged the church reputation.*
- 4. Rev. Kithokoi since his posting to AIC Runda on 18/5/2008) has not been faithful and committed to his work as a church Minister and has a habit of reporting Late (11.00am – 11.30am) and comes only on Sunday and he is the first person to leave.*
- 5. The Minister is disrespectful to the LCC and has never been attending local church council meetings, only attended is first meeting on 23/8/2009 this was after pressure was put on him.*
- 6. Rev. Kithokoi has created disunity within the church and the divisions have adversely affected the operations of the Local church. The Minister has demonstrated a high degree of arrogance and has no respect to others not even those in authority.*
- 7. Rev. Kithokoi has openly made false allegation against other people with intention to injure (damage) peoples reputation and stirring dissensions among brethren this is causing animosity and badly damaged unity of the church.*
- 8. Rev. Kithokoi has been promoting disobedient (rebellion) against the Local church leadership. His actions on 18th July 2009 to assisting and supporting a suspended church elder to work in the church and for the Minister in dedicating the same work was not only bad but also against collective responsibility of a church 23/6/2009 and the work was done without the knowledge of an authority of the LCC. And when Rev. Kithokoi was confronted by council members on 23/8/2009 he proudly responded that as far as he is concerned the pastor in -charge nor the LCC has powers to suspend any one and thus has created dissidents.*
- 9. Rev. Kithokoi has no value for team work nor does he involve his family neither does embrace partnership as far as church work (Ministry is concerned.)*

At a meeting on 13th December, 2009 at the same A.I.C. Ziwani, the following observations were made on the claimant

IMPORTANT DATES FROM THEM

They reported that Rev. Kithokoi has addressed the church very strangely on the following dates:-

- 1. November 1, 2009 he told the church that staff had not been paid for 3 months and Pastor Stephen Musyoki pastor in-charge was in the church then.*
- 2. In November 15, 2009 he addressed the church negatively to the surprise of many of us who were in attendance.*
- 3. On November 29, 2009 was a good and great day for us in a joint leader's meeting the two pastors agreed to reconcile before us. They greeted each other and hugged before us. We are even surprised that we were called here, they said as we had thought things would now work for better.*

This matter came to court severally for hearing until the 28th November, 2013 when the parties agreed to dispose of the matter by way of filing witness statements. On 29th January, 2014 there were further developments when Mr. Masese, counsel holding brief for Miss Obura for the claimant made a proposal for proceeding by way of cross-examination with the respondent not calling any witnesses.

On 22nd February, 2014, the claimant testified in evidence in chief reiterating his case and reliance of a witness statement sworn on 3rd December, 2013. He admitted and testified on cross-examination that there were allegations made against him before dismissal but these were not in his capacity as a pastor. The parties opted for disposal of the matter by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the claimant's employment wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the cost of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. In his written submissions, the claimant states that despite the respondent passing two main defences to the quest to dismiss him from employment, these are not proven in evidence but are only discussed in meetings of the respondents. The claimant further disputes the validity of letters issued to him by the respondent and deems the same inconsequential and of no effect. He deems himself aggrieved in the circumstances.

The respondent in her written submissions reiterates his case the dismissal of the claimant was strictly in conformity with the law. The respondent has raised serious allegations of illicit sexual behavior, poor working relationship with colleagues, arrogance, pride, poor work ethics, misuse of church funds and a striking perplexing resemblance whereby in each of the congregations the claimant was posted, he was rejected by the local church congregations and the local church elders. This is confirmed by the frequent discussions of his place and conduct in the church at virtually every church meeting. The claimant indeed made and wrote a letter of apology seeking forgiveness from the respondent. He did not display a change of heart as is reflected in further proceedings in his conduct and therefore the respondent's decision to send him on compulsory leave and ultimately summary dismissal.

The dismissal of the claimant was not abrupt or sudden. He had been awarded several opportunities to reform and remake himself or even make a defence but would not. This met the necessary tenets of the principles of natural justice and therefore the claimant cannot be heard to complain of the flouting of the

same.

My Lord, the claimant is an ordained priest. He was employed as a pastor to shepherd his flock and to propagate the word of God. A religious leader, preacher and teacher is a high calling. It calls upon the person to be without reproach, without blemish and to act as an example to others. Even the slightest suspicion of behaving otherwise or in a manner contrary to the said expectations can bring the entire congregation, the church and Christianity as a whole into disrepute. As we look at the allegations against the claimant, the court needs to take judicial notice of the nature of his work and what is reasonably expected of a person occupying such a post using the objective test of what is reasonable in the circumstances. Is a church leader expected to engage in illicit sexual relationships or act in a dishonest manner or in a manner that can bring the word of God into disrepute? Certainly, the answer is no. Thus, the allegations against the claimant are of such a nature that they amount to gross misconduct and can in all fairness attract summary dismissal. Such allegations do fall within the scope of gross misconduct as envisaged under section 44(d) of the Employment Act.

This satisfies S.44 and particularly 44(d), Employment Act, 2007.

44.(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- a. *without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
 - b. *during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*
 - c. *an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
-
- a. *an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed in authority over him by his employer;*
 - b. *(e) an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*
 - c. *in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*

- d. *an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

The respondent further sought to rely on the authority of *Wilson Nduati Njoroge vs The Attorney General & Another*, 2005 eKLR, the Court of Appeal in dismissing the appeal observed as follows;

"We have now considered what has been argued before us in this appeal and it would appear that the appellant's dismissal was triggered by his own conduct when he was arrested for what was described as trafficking."

and also clause 6.4 of the respondent's terms of service as relied on by the parties

6.4. Grounds for summary dismissal: In accordance to the guidance given in Section XIII of the Africa Inland Church by-laws, any employee of the DCC who is proven to be guilty of theft, immorality, witchcraft, idolatry, drunkenness, the use of tobacco or other narcotics, participation in heathen sacrifices, heathen dances and other pagan practices that are contrary to the profession of Christianity (1 Corinthians 5:11 and Galatians 5:19-21) may risk summary dismissal. In such cases, the DCC executive will thoroughly investigate the matter and make appropriate recommendations to the full Council.

This court's analysis of the evidence of the parties hereinabove culminates in a finding against this claim. This is because despite the overwhelming evidence of misconduct on the part of the claimant by the respondent, the claimant does not get out of his way to controvert or rebut the evidence to his favour. He merely denies the same and ends at that. He puts it as follows at pages 2 and 3 of this written submissions;

ii)a) The Respondent purports that the Claimant engaged in immorality and theft during his tenure as a Pastor, however there is no evidence of the furnished before this honourable court. Before this Honourable Court are allegations of immorality and theft that were discussed in meeting. In conclusion, the Respondent themselves admit that there was no evidence of the said allegation.

ii) To date, the Claimant have not been investigated and or a report produced for the reasons specified in the Respondent's Terms of Service and Conditions for Pastoral, quasi-Pastoral and Non-Pastoral staff and Church's constitution.

Whereas this can be said to be partially true, one notes that at all times the respondent/employer was accommodative and conciliatory to the claimant. She always shepherded and offered him another chance which the claimant was always unable to take up and therefore the termination of employment. On a test of a balance of probabilities which is applied in the determination of civil cases, one also finds the matter tilting in favour of the respondent. The question here is; on a balance of probabilities, which is the likely or probable scenario in the circumstances?

This court is also alive to the fact that sexual immorality is a personal and passionate misconduct that cannot readily be brought out in empirical evidence. In the absence of testimony by the core commitant, this would require criminal law nature of investigations and evidence to prove issues of sexual immorality. It is not absolutely necessary in the circumstances of this case. In any event, the claimant does not offer anything in rebuttal or contradiction but merely denies the same.

I therefore find and agree with the respondent that the claimant's termination from employment and dismissal was lawful and apt.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. However, the respondent admits an amount of Kshs.239,878.80 as owing to the claimant by herself. She also concretizes this as Ksh.170,812.00 after deductions of owings by the claimant.

I am therefore inclined to dismiss the claim and order a refund of Ksh.170,812.00 as admitted by the respondent.

The cost of this cause shall be borne by the claimant.

Delivered, dated and signed the 30th day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Obura instructed by Lumumba, Mumma & Kaluma Advocates for the claimant.
2. Mr. Webale instructed by Mativo & Company Advocates for the Respondent.