



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 26 OF 2013

(formerly NAI No. 1361/12 & 1004/12)

(Before Hon. Justice Hellen S. Wasilwa on 21st November, 2014)

ELIJAH MIDIGO OCHIENG & 4 OTHERS

.....CLAIMANTS

-VERSUS-

**TRUSTEES, KENYA LAKE CONFERENCE & S.D.A CHURCH E.A.
LTD.....RESPONDENTS**

JUDGMENT

The claimants herein filed their memo of claim on 9.8.2012 and 10.8.2012 through the firm of Otieno C. O. Ayayo & Co. Advocates. Initially 2 different claims were filed but they were later consolidated into the current one and heard as one.

The claimants case is that they were all employees of the respondents having been employed as pastors. The claimants were employed on diverse dates from 1972, 1983, 1998, 2002 and 26/1/2011 respectively.

The claimants case is that they all served the respondents faithfully and diligently. However their services were terminated by the respondents in a manner the claimants say was unlawful and wrongful.

The 1st claimant Elijah in his evidence in court stated that he had served the respondents for 40 years and was expected to retire at 60 years. He is currently 61 years. He stated that on 26.2.2012 his services were terminated. He had initially received a call informing him to prepare to leave. On 8.3.2012 one Mr. Panyako gave him a verbal termination. On this day, he was at work at Kakelo District when a telephone call came asking him to go to the office. He was then given a termination letter on the same day.

All the claimants aver that they were terminated without notice to show cause. They had not been given any prior warnings of any misgivings. They were also dismissed casually and/or verbally by mobile phone short messages without reasonable grounds. The letters terminating them had indicated that they were involved in fraud and/or misappropriation of funds on several dates, the amounts which were listed. The letters also indicated that they had been given an opportunity to appear before the Kenya Lake Conference Executive Committee sitting on 26.2.2012 and had confessed in writing their involvement in these acts of fraud. A decision was thus made to dismiss them on their own confession with loss of benefits as per the church policy. The claimants denied they confessed their involvement in the fraud alleged. They also stated that they were never given any hearing. It is their contention that they were dismissed unfairly and without any justifiable cause.

The respondents filed their answer to the memo of claim on 24.7.2012 through the firm of Abisai & Co. Advocates. It is the respondents defence that the claimants services were terminated on 26.2.2012 after they committed acts of gross misconduct. It is also their contention that the 1st claimant was not employed in 1972 but on 4.3.2005. They also contend that the 2nd claimant was employed on 7.4.2009, the 3rd one on 2.3.2004 and the 4th on 6.3.2009 as per their letters of contract. It is also the respondents contention that the claimants were not wrongfully or unlawfully terminated. Their contention is that the dismissal was warranted and that the claimants are not entitled to any termination allowance and/or retirements benefits as pleaded.

The respondents position is that the termination meted out on claimants was not contrary to the Working Policy of the Seventh Day Adventist Church which is it's Constitution and/or operative guidelines of the respondents and they also deny contravening the Laws of Kenya contrary to claimants assertions, the respondents aver that their funds were properly audited and that the statutory deductions were accurate. The respondents further deny terminating the claimants without notice nor warning and they deny doing it verbally or through mobile phone short messages without proper investigations. The respondents aver that they dismissed claimants after instituting and/or providing an audit report against a claim of fraud and/or misappropriation and that they followed the proper procedure.

It is the respondents position that the claimants were their employees charged with responsibilities of taking care of the pastoral needs of the members in smaller units known as Districts. Their duties entailed collecting tithes, offerings and donations from members of the church, bank them and surrender banking slips to the respondents. The collections were to be utilized in the day to day running of the organization.

The respondents contends that in total disregard to their duties, mandate duty and/or appointment and in total disregard of the terms and condition of service as contained in the Seventh Day Adventist Church Working Policy a document governing the conduct of employees of the church, misappropriated funds, monies, tithes and offerings which came into their possession by virtue of their employment.

The respondents aver that the claimants appeared before the Executive Committee meeting convened with due notice to the claimants who attended in person. They were given an opportunity to defend themselves on the charges levelled against them and they all admitted in writing having embezzled the respondents money and undertook to repay the same. That this misconduct by the claimants was gross and in accordance to the Working Policy of the respondents, were summary terminated without any benefit.

The respondents further aver that they did not take away the statutory deductions accrued to the claimants as they periodically remitted the statutory deductions to the government agencies from where the claimants could obtain the same.

It is the respondents position that the claimants failed to bank the cash they collected from members of the church but instead procured fraudulent pay in slips which they presented to the respondents. The respondents sought to have this claim dismissed.

Having heard all the parties and upon considering their respective submissions and all memoranda presented, the issues for determination by this court are as follows:-

- 1. Whether there were proper reasons to warrant dismissal of the claimants.**
- 2. Whether the claimants were accorded due process before dismissal.**
- 3. Whether there were any statutory deductions deducted from claimants not remitted to the relevant agencies for which the claimants are entitled.**
- 4. What remedies if any, the claimants re entitled to.**

On the 1st issue, according to the termination letters given to the claimants, they were found to have been involved in acts of fraud and/or misappropriation of funds on several dates and periods. The question then is whether these reasons are valid and established.

Under S. 43 of the Employment Act 2007:-

“(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 S. 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.”

It is the respondent's position that indeed the claimants committed the acts of fraud which involved misappropriating funds, monies, tithes and offering which came into their possession. The respondent's contention is that the claimants failed to bank the money in question and instead submitted fake banking slips to cover up their acts. The respondents submitted to court various banking slips purportedly banked by claimants on different occasions and when verified these slips were confirmed to be fake.

The bank statements of the respondents produced in court also show that the moneys which were allegedly banked were never reflected. Coupled with the fake slips, and the bank statements are the collection slips showing that the moneys had been collected and signed for by each claimant. The claimants have in writing admitted not accounting for certain amounts of money which the respondents say is an admission of guilt. Did the claimants admit defrauding the respondents? In their evidence, the claimants have denied defrauding the respondents. They denied signing the fake deposit slips. It is their position that they have no knowledge of the said slips and they aver that they do not bear their signatures. The respondents were unable to establish that the slips were supplied and signed by claimants.

A sample of the letters written by claimants states:-

“This is to inform you that Kshs 340,864/= was not reported to Kenya Lake Conference account during the year 2011. I am sorry for that I do apologize ---”

Another stated:-

“Unreported trust funds to Kenya Lake Conference Kshs 427,311.

I hereby accepted the above amount was not reported to Kenya Lake Conference and the office. Consequently I am sorry for the same and sincerely do apologize. My lay down plan to pay the amount by end of June 2012.”

All the claimants wrote similar letters. Their claim is that the accountant was the one responsible for collecting the banking slips and he was the one charged in court by the police. The claimants further intimated to court that they wrote letters of admitting not reporting the money after being intimidated to do so. They further intimated to court that the banking slips they were given were handed over to them by the church treasurers.

Did the above reasons make the basis upon which claimants were dismissed? It is apparent that indeed if true, these were valid reasons to warrant dismissal. However, these reasons were also a basis of criminal charges where the church accountant was charged after investigations by the police. Given that there is no proof that the fake slips were generated by the claimants, and the claimants having denied them, it remains a fact that there was no proper reason upon which the dismissal of claimants was based upon.

The next issue is on due process. The claimants told court that they were summoned through text messages to attend a meeting on 26.2.2012 of Kenya Lake Conference. It is during this meeting, minutes of which are appended at pg 108 that a decision to dismiss the claimants was arrived at. The minutes show who were present in this meeting. The minutes are signed on 28.2.2012. The minutes indicate that the claimants attended the meeting which the claimants have denied.

According to respondents Working Group Policy, however the process for disciplining an errand employee is not indicated. This then means that the process envisaged is that provided for under S. 41 of Employment Act 2007 which 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 reasons 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 sub – section (1) make.”

There is no indication that the claimants went through this process as no notice was given to them of what they had been accused of doing. They were not given ample time to give their version of the story. They were summoned to a meeting via short text messages and heard after one day without prior notification of the complaint against them. It is therefore clear that due process was not followed. It therefore follows that any action taken against the claimants without following due process amounts to an unfair and wrongful termination and is therefore null and void.

On the 3rd issue, is the issue of statutory deductions which claimant avers were deducted from their salaries but not remitted to the relevant body. The main contention is NSSF deductions. The respondents have however proved to this court that they always made deductions of NSSF and also remitted as expected as per Appendixes in pages 183 to 259 of their memo of reply. The issue of non remittances is therefore not proved and I find claimants are not entitled to this prayer.

It is therefore the finding of this court that claimants have established their case as against respondents. I therefore find for them as follows:-

1st Claimant – Elijah Midigo Ochieng:

1. 1 month salary in lieu of notice = Kshs 57,130.80/=
2. 12 months salary as damages for unlawful termination = 12 X 57,130.80 = Kshs 685,569.60/=.

TOTAL = KSHS 742,700.40

2nd Claimant - Wilson Oyugi Ajuoga:

1. 1 month salary in lieu of notice = Kshs 41,472.48/=
2. 12 months salary as damages for unlawful termination = 12 X 41,472.48 = Kshs 497,669.76/=

TOTAL = KSHS 539,142.24

3rd Claimant – Thomas Juma Oula:

1. 1 month salary in lieu of notice = Kshs 60,829.54/=
2. 12 months salary as damages for unlawful termination = 12 X 60,829.54 = 729,954.48

TOTAL = KSHS 790,784.02

4th Claimant - James Ngoche:

1. 1 month salary in lieu of notice = Kshs 57,737.38/=
2. 12 months salary as damages for unlawful termination = 12 X 57,737.38 = Kshs 692,848.56

TOTAL = KSHS 750,585.94

5th Claimant – Obuya Barnabas:

1. 1 month salary in lieu of notice = Kshs 17,320/=
2. 12 months salary as damages for unlawful termination = 12 X 17,320 = Kshs 207,840

TOTAL = KSHS 225,160

All payments are subject to statutory deductions. Each claimant shall be issued with a certificate of service. Respondents shall bear costs of this suit.

HELLEN S. WASILWA

JUDGE

21/11/2014

Appearances:-

Ayayo for claimant Applicants

Abisai for respondent

CC. Wamache