



**Ayara v Makrias & another as Trustees of Shalom Christian Missions & 2 others
(Cause E036 of 2021) [2023] KEELRC 297 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E036 OF 2021
CN BAARI, J
FEBRUARY 9, 2023**

BETWEEN

MARK AYARA CLAIMANT

AND

**JOY MAKRIAS & GAYE MAKRIAS AS TRUSTEES OF SHALOM CHRISTIAN
MISSIONS 1ST RESPONDENT**

NEW BEGINNING CHILDREN CENTRE 2ND RESPONDENT

GAYE MAKRIAS 3RD RESPONDENT

JUDGMENT

Introduction

1. The Claimant's Memorandum of Claim is dated March 31, 2021, and filed on April 15, 2021. He seeks Payment of Kshs 3,033,000.00, comprising of unpaid salary, leave allowances, compensation for unfair termination, pay in lieu of termination notice and overtime pay. The Claimant further prays for an order directing the Respondents to issue him with a certificate of service, payment of aggravated damages for inhumane treatment, interest and costs of the suit.
2. The Claimant sought leave to amend his claim which he did vide an Amended Memorandum of Claim filed on April 4, 2022. The amended claim only introduced new Respondents, but the rest of the claim remained unchanged.
3. The 2nd Respondent entered appearance through the Firm of Nyauke & Co Advocates on April 26, 2021, and filed a Response to the claim and a Counter Claim dated May 11, 2021, and filed on May 20, 2021.



4. The Claimant's case was heard on January 25, 2022. The Claimant testified in support of his case. He adopted his witness statement and produced documents filed in support of his case. The Claimant was again heard on September 20, 2022, when he produced additional documents as exhibits in his case.
5. The Claimant further presented one Mr. Philip Okom who testified in support of his case. Mr Okom adopted his witness statement and was subsequently cross-examined in relation to his statement.
6. The Respondents' case was heard on October 26, 2022. John Makrias and Gaye Makrias testified for the 2nd Respondent. Both adopted their witness statements.
7. Submissions were filed for the Claimant and the 1st, 2nd and 3rd Respondents.
8. The Respondents introduced in the amended memorandum of claim did not participate in the suit.

The Claimant's Case

9. The Claimant's case is that he was employed by the Respondents sometimes in July 2017, as a Director in charge of the day to day activities of the 2nd Respondent at a monthly salary of Kenya Shillings Seventy One Thousand (Kshs 71,000.00)
10. It is the Claimant's case that he was entitled to allowances including car maintenance, food and housing, amounting to about Kshs 10,000.00 per month, bringing his total earning to Kshs.81,000.00 per month.
11. The Claimant states that from the date of his employment, he performed his duties faithfully, diligently and efficiently until October 24, 2020, when the 3rd Respondent unlawfully and illegally blocked him from accessing his workplace and his house, which were situated within the premises of the 2nd Respondent.
12. It is the Claimant's case that on October 24, 2020, the 3rd Respondent wrote a text message to him through telephone number 0748006434 which is registered in the name of the 3rd Respondent, informing him that his resignation takes effect from October 24, 2020.
13. The Claimant's further states that on October 25, 2020, through the assistance of the area Assistant Chief and two other people, he went to the Respondents premises where he had been working and was surprised and shocked to find some of his personal items dumped at the gate. It is his case that most of his items were missing, and that this was done under the instructions of the 3rd Respondent.
14. The Claimant states that he was never given any reasons for the summary dismissal by the 3rd Respondent, nor was he issued notice or payment in lieu of notice. The Claimant further states that he was also not paid his salary for the month of October, 2020, despite having worked in that month.
15. It is the Claimant's case that his termination from the service of the Respondents was unlawful, un-procedural and amounts to breach of his employment contract and employment laws.
16. The Claimant states that he worked 7 days a week without any rest and/ or off days, and neither was he compensated for the days worked and for work done on public holidays.
17. The Claimant states that during his employment he never went on leave and neither was he paid by the Respondents. It is his further case that he worked from 8.00am to 7.00pm daily without being paid for the overtime.
18. It is the Claimant's case that the action of the Respondents of blocking him from accessing his house and personal items, and forcing him to spend in a hotel from October 24, 2020 to October 25, 2020,



and further dumping his personal items at the gate of the 2nd Respondent, was an act of cruelty, inhumane and demeaning treatment which occasioned him embarrassment and humiliation, and for which the Claimant claims damages.

19. The Claimant prays that he is awarded the reliefs listed in his memorandum of claim.

The Respondents' Case

20. The 2nd Respondents admits that the Claimant was employed as its Centre Director earning a monthly gross salary of Kshs 71,000.00. The 2nd Respondent denies that the Claimant was entitled to allowances amounting to Kshs 10,000.00.

21. It is the 2nd Respondent's case that the Claimant engaged in dishonest activity, and that he subsequently abandoned his responsibilities. The Respondent states that it never blocked the Claimant from performing his duties.

22. The 2nd Respondent states that it is not privy to any communication between the Claimant and the 3rd Respondent as alleged. It is the 2nd Respondent's case that the Claimant has refused to formalize his departure from the employ of the 2nd Respondent.

23. The Respondent further states that there is no proof that the Claimant was terminated by them.

24. The Respondent states that the Claimant has not proved that he worked 7 days a week since no attendance registers have been produced in evidence in this respect. It is the 2nd Respondent's position that the Claimant always took his off-days as he wished without interference.

25. The Respondent further states that the Claimant having been the centre director, it was his responsibility to approve leave including his own, and that if he did not take his leave days, it was by choice.

26. The Respondent states that the October salary claimed is not available to the Claimant as it is not justified nor was there any arrangement to pay the Claimant Kshs 81,000 instead of Kshs 71,000.00.

27. The 2nd Respondent states that the Claimant failed to keep records of financial transactions he undertook on behalf of the 2nd Respondent. The Respondents further states that the Claimant failed to provide accounts of the sum of Kshs 800,000.00 and further that he failed to apply a total sum of Kshs 120,000.00 sent to him to purchase gifts.

28. It is the Respondents' case that the Claimant failed to remit statutory deductions and had instead squandered the money meant for that purpose.

29. The 2nd Respondent prays that the Claimant's claim be dismissed and their counter claim allowed, with an order for specific performance to compel the Claimant to hand over all the records in his custody belonging to the 2nd Respondent.

The Claimant's Submissions.

30. It is submitted for the Claimant that the documents filed on April 4, 2022, shows that there is a trust deed which established new beginnings SCM Kenya Trust with several trustees, and the deed was registered at the land office, and that the witnesses who testified on behalf of the Respondents are listed as trustees in the trust deed. It is the Claimant's further submission that he was employed by the Respondents as a Director of the 2nd Respondent.



31. It is further submitted for the Claimant that the evidence by the three witnesses that the 3rd Respondent had locked out the Claimant from accessing his workplace both on October 24, 2020 and on October 25, 2020 was never challenged in court.
32. The Claimant submits that in the evidence adduced in court, the Respondents did not avail any reason for termination of his employment, and that there was no compliance with procedure in terms of notice and hearing as required by law. The Claimant further submits that his termination was unlawful for lack of compliance with the provisions of the law. They sought to rely in Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR to support this position.
33. It is the Claimant's submissions that the 3rd Respondent acted unilaterally and in breach of the employment laws and labour regulations in terminating the employment of the Claimant.
34. The Claimant further submits that he was subjected to inhumane and degrading treatment. He had reliance in Marete Vs Attorney General [1987] eKLR, Nairobi HCC MISCCNO 668 of 1986 to buttress this position.
35. The Claimant further submits that during the hearing of this case, the 2nd Respondent did not prosecute the counter-claim. He further submits that there was no evidence adduced in court to show that the Claimant had in his possession records of the 2nd Respondent, or that the Claimant had any monies belonging to the 2nd Respondent.
36. It is the Claimant's submission that the 2nd Respondent did adduce evidence in support of the allegations in the counter-claim

The 1st, 2nd and 3rd Respondents' Submissions.

37. It is submitted for the Respondents that no contract of employment was brought to Court to show who actually employed the Claimant.
38. The Respondents further submit that the parties submitting herein were merely volunteers and there is nothing on record to show that they employed the Claimant.
39. It is the Respondents' submission that the parties submitting herein are foreigners and who had no capacity to employ anybody unless otherwise authorized by law, and that nothing has been placed before the Court to the contrary.
40. The Respondents submit that there was completely nothing produced to prove that either the SCM (K) Trust or New Beginning Children Centre are legal entities capable of being sued in accordance with the law and that the court cannot be asked to issue orders against illegal or non-entities.

Analysis and Determination

41. The issues that fall for determination are: -
 - i. Whether the Claimant was an employee of the Respondents
 - ii. Whether the Claimant was unfairly terminated
 - iii. Whether the Claimant is entitled to the remedies sought.



Whether the Claimant was an employee of the Respondents

42. This issue arises from the 1st and 3rd Respondent's denial that they employed the Claimant, and their assertion that the 2nd Respondent is a non-legal entity without capacity to employ. Also informing this issue is the absence of a contract of service between the Claimant and any of the Respondents.
43. From the court record, the Claimant's relationship with the Respondents dates back to April, 2015, as indicated by an email from the 1st Respondent to the Claimant. In that email, the 1st Respondent informs the Claimant that the 2nd Respondent intends to recruit an additional Director and that the Claimant was to inform him what the Claimant required in terms of monthly payment amongst others, to help bring him on board.
44. The *Employment Act*, 2007, at Section 8 recognizes that a contract of service can either be oral or written. It then follows that contrary to the Respondents' assertion, the absence of a written contract between the Claimant and the Respondents does not connote the absence of an employment relationship between the parties herein.
45. The Claimant produced in evidence a payroll for the 2nd Respondent which bears his name as one of their employees. He further produced a letter of resignation addressed to the 1st Respondent which implies an employment relationship, as without which, the Claimant would not need to resign.
46. The court is convinced that for all intents and purposes, the Claimant was in the service of the 2nd Respondents which is operated by the 1st and 3rd Respondents and I so hold.

Whether the Claimant was unfairly terminated

47. The Claimant issued a two months' notice of resignation dated October 12, 2020, which indicated that he will continue in the service of the 2nd Respondent until the end of December, 2020. It is upon this notice that the Claimant was locked out of the 2nd Respondent's premises on his return from a seminar. The issue is whether this is an unfair termination.
48. A termination is unfair where an employer fails to adhere to Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007. These provisions relate to both the procedure adopted by the employer prior to the termination, as well as the substantive justification for the termination.
49. The Respondents have not disputed that the Claimant was not heard or given any reasons for the termination. Their position is that the Claimant abdicated his responsibilities and duties. The Respondents further contend that the Claimant was not terminated.
50. Email exchanges between the Claimant and the 1st Respondent, are a clear indication that the Respondents were aware that the Claimant was away attending a training at Homabay. The allegations that he had abandoned his duties are thus unfounded.
51. Although the Claimant had given notice of his resignation, the resignation was to take effect two months after the notice, and the Claimant was thus still an employee of the Respondents, and for whom the provisions of Section 41, 43, 45 and 47(5) of the *Employment Act*, 2007, applied.
52. That the Claimant was simply locked out of his place of work without being accorded due process and reasons for the termination, is no doubt an unfair termination of employment. In *Walter Ogal Anuro vs Teachers Service Commission* (2013) EKLR the Court held thus;

“...for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive



justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

53. Notice of resignation is not a reason for termination. The Claimant adhered to the requirement of the *Employment Act* in giving notice of his resignation and proceeding to ask that his successor be recruited to enable him mentor before he exits.
54. I find and hold that the Claimant was unfairly terminated from the service of the Respondents.

Whether the Claimant is entitled to the remedies sought.

55. The Claimant’s claim against the Respondents is for payment of Kshs.3,033,000.00, comprising of unpaid salary, leave allowances, compensation for unfair termination, pay in lieu of termination notice and overtime pay. The Claimant further prays for an order directing the Respondents to issue him with a certificate of service, payment of aggravated damages for inhumane treatment, interest and costs of the suit.

Unpaid Salary for October, 2020.

56. The Claimant issued his notice of resignation on 12th October, 2020, and which was to take effect at the end of December, 2020. He was subsequently locked out of his office and residential house within the premises of the 2nd Respondent on October 24, 2020.
57. The Claimant’s claim for payment of salary for the month of October, 2020, is merited as he was still in the service of the Respondents as at October, 2020. The claim succeeds.

Leave Allowances and Overtime Pay

58. The Claimant’s claim for payment of overtime and holiday work was not proved. No evidence was led to show that the Claimant worked overtime or that he worked during public holidays.
59. Further, as correctly submitted by the Respondent, no evidence was led to show that the Claimant had unutilized leave days. Furthermore, no mention of these claims was made in the Claimant’s letter of resignation addressed to the 2nd Respondent, noting that he was the employee responsible to approve leave on behalf of the 2nd Respondent.
60. The claims fail and are dismissed.

Compensation for Unfair Termination,

61. The court has made a declaration that the Claimant’s termination is unfair. This finding entitles the Claimant to compensation in accordance with Sections 49 and 50 of the *Employment Act*.
62. The Claimant had already tendered notice of his resignation from the service of the Respondents. He therefore did not have reasonable expectation that he would continue in the service of the Respondents but for the termination.
63. Considering the circumstances in which the Claimant’s termination occurred, and more so the humiliation he was taken through, and the expenses he incurred as a consequence of the termination such as having to reside in a hotel, I deem an award of five months’ salary sufficient compensation for the unfair termination.



64. On the counter claim, none of the witnesses presented by the 2nd Respondent adduced any evidence in support of the counter claim.
65. In my opinion, the issues subject of the counter claim are mere after thoughts for reason that they were never raised before the Claimant tendered his resignation. It is also true that Respondents did not adduce any evidence in support of the counter claim and it fails and is dismissed.

Pay In Lieu of Termination Notice

66. The Claimant's claim in this respect is for five months' salary in lieu of termination notice. Notice period is provided for under a contract of service and in the absence of such an agreement, the statutory one month's notice applies.

67. Section 49(1) (a) provides as follows in regard to pay in lieu of notice:

“Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following –

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;”

68. The parties herein did not produce a contract of their engagement. For this reason, the statutory one-month notice applies, and being evident that the Claimant though having himself issued notice of his resignation, he was not given any notice when his employment was terminated before the end of his resignation notice. He is thus entitled to a one month's salary in lieu of notice and which is hereby awarded.

69. In whole, Judgment is entered for the Claimant against the 1st, 2nd and 3rd Respondents jointly and severally as follows:

- i. A declaration that the Claimant's termination is unfair.
- ii. Salary for the month of October, 2020 at Kshs 71,000/-
- iii. One Month's Salary in lieu of termination notice at Kshs 71,000/-
- iv. 5 Months' Salary in compensation for unfair termination at Kshs 355,000/-
- v. Costs of the suit and interest until payment in full.
- vi. Payments shall be subject to Statutory deductions.

70. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF FEBRUARY, 2023.

CHRISTINE N BAARI

JUDGE

Appearance

Mr Bagada h/b for Mr P D Onyango for the Claimant



Mr Nyauke present for the Respondents

Ms Christine Omollo C/A

