

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 95 OF 2022

JOSEPHINE MBURU CLAIMANT

VERSUS

MOI UNIVERSITYRESPONDENT

JUDGMENT

Introduction

1. By the Memorandum of Claim dated 19th December, 2022, the Claimant sued the Respondent seeking the following reliefs against it;
 - I. A declaration that the termination of her employment by the Respondent was unfair.
 - II. Terminal dues as tabulated herein under:

a. Unpaid Salary.....7

$1/2\text{months} \times 167,000 = 1,252,500$

b. One month's pay in lieu of notice.....=167,000

c. Unpaid leaves..... $167,000 \times 11\text{years} = 1,844,700$

d. House Allowance..... $15\% \times 167,000 \times 12 \times 11\text{years} = 3,320,000$

e. Service pay.....
 $.15\% \times 167,000 \times 12 \times 11\text{years} = 3,320,000$

f. Compensation for Unlawful dismissal.
 $167,000 \times 12 = 672,000$

Total.....

Kshs.10,576,200

III. Cost of the suit and interest at court rates from the date of judgment.

IV. General Damages

V. The Claimant be granted a Certificate of service by the Respondent.

2. The Respondent opposed the claim through a Response to Memorandum of Claim dated 4th March 2023. It denied that the Claimant was its employee at any time, her assertion that it unfairly terminated her employment, and any entitlement to the reliefs sought.
3. At the hearing, the parties adopted their respective witness statements filed herein as their evidence in chief, and by consent, tendered in evidence the documents filed herein under their respective lists of documents.

Claimant's case

4. The Claimant stated that she was employed by the Respondent in September 2009 as a lecturer earning a monthly salary of KShs. 167,000. She claimed that her duties included teaching various undergraduate and postgraduate units, setting and invigilating examinations, marking scripts,

and preparing and submitting score sheets alongside examination scripts to the Respondent.

5. She stated that she diligently and faithfully performed her duties until January 2019, when, upon reporting to work, she discovered that all the teaching units previously assigned to her had been withdrawn and allocated to another lecturer without prior notice or explanation.
6. The Claimant further stated that, following this development, she made several attempts to contact the Head of Department and the Director to clarify her employment status or secure payment of her dues, but they failed to respond or provide any explanation.
7. It was her case that the Respondent unfairly terminated her employment without notice, reasons, or a hearing, and failed to pay her outstanding dues.
8. She asserted that at the time of termination, the Respondent owed her salary arrears for seven and a half months, house

allowance, service pay, and accrued leave, which were never settled.

9. She also stated that the Human Resource Policy Manual, the university statutes, and the policy on part-time lecturing relied upon by the Respondent were unknown to her and did not exist at the time of her recruitment in September 2009.
10. The Claimant argued that, if such policies existed, it was the Respondent's duty as employer to inform her and to formalise any terms affecting her employment, and that she bore no responsibility to verify the Respondent's internal recruitment procedures.
11. The Claimant therefore asserted that her termination was unlawful and unfair and requested that the Court uphold her claim and grant the reliefs sought.
12. Cross-examined by the Respondent's Counsel, the Claimant stated that she applied for the position she held at all material times, after which she was engaged. Nonetheless, the Respondent never issued her a letter of appointment.

She did not, at any time during her employment, request a written contract.

13. The Claimant further testified that she had not submitted any document as evidence of her monthly salary. She was paid based on the units she taught. She also testified that she was engaged as a part-time lecturer. She taught a total of 8 units. Under the payment scheme, she would earn more for postgraduate units than for undergraduate ones.
14. The bank statements for the period 2014 to 2017 indicate that the Respondent was paying her salary. Although she did not produce the statements for 2009-2013, if she had requested the bank to supply them, she would have been able to obtain them.
15. The units she taught would differ from semester to semester, the reason why the payments made to her could differ from time to time.
16. The unpaid salary for 7.5 months that she claims was for the period from 2017 to 2019.

Respondent's case

17. The Respondent, through its witness Benjamin Mutuku, the Acting Deputy Registrar in charge of Recruitment and Training at Moi University, stated that the recruitment and appointment of staff is governed by the Moi University Statutes of 2013, the Moi University Human Resource Policy Manual, and the Moi University Academic Staff Appointment and Promotion Policy of 2012.
18. According to the Respondent, the University Council is responsible for appointing academic and administrative staff and for establishing the terms and conditions of employment, which are outlined in the relevant collective bargaining agreements and university policies.
19. The witness further explained that the recruitment of academic staff is conducted competitively for existing vacancies identified by the respective departments, following a structured process that includes approval for recruitment, public advertisement of vacancies, shortlisting

of candidates, interviews, and final approval by the Vice Chancellor.

20. He stated that successful candidates are given written letters of appointment detailing the position, salary, terms and conditions of service, duties, and reporting structure, and that the signed appointment letter forms the contract of employment and is kept in the employee's personal file.
21. The Respondent therefore contended that recruitment at the University strictly adheres to the prescribed statutory and policy framework governing staff appointments.
22. Cross -examined by Counsel for the Claimant, the witness testified that he first joined the employment of the Respondent on 18th December 2001.
23. The witness further stated that he was not aware that the Claimant was first employed by the Respondent in 2009. He would not confirm, as the Respondent has no record to that effect.

24. He further stated that he was not in a position to confirm that the Respondent paid the Claimant's salary, as shown in the Bank statements she submitted in evidence.

25. He could not with certainty state how the Claimant was recruited. However, if someone were to be appointed as a part-time lecturer, the process could always begin with the Head of Department, who would engage the person seeking the role. The Head of Department would then involve the Dean, who could forward the relevant documents to the Deputy Vice-Chancellor, Academic Resource, Extension and Student Affairs, for approval. After approval, the appointment letter would be issued by the Deputy Vice Chancellor of Administration, Planning, and Strategy.

26. The timetable presented by the Claimant bears the Respondent's stamp. It looks genuine.

Claimant's submissions

27. The Claimant submitted that under sections 10(6) and (7) of the Employment Act, the obligation to keep and produce

employment records rests with the employer. She argued that the Respondent failed to produce such records to counter her evidence and instead relied on internal policies and statutes which were never communicated to her and which, according to her, came into force after her engagement.

28. In support of her position on the burden of proof and the employer's duty to produce employment records, she relied on **Njoroge v Moi University (2024) KEELRC 2806 [KLR]**.

29. The Claimant stated that her employment was unfairly and unlawfully terminated in January 2020 when she found out she had not been allocated any teaching units for the new semester. She also mentioned that the Respondent failed to provide any explanation despite her efforts to seek clarification. She argued that the Respondent neither gave a valid reason for the termination nor granted her a hearing, contrary to sections 43 and 47(5) of the Employment Act.

30. Regarding remedies, the Claimant submitted that she was entitled to the reliefs sought, including unpaid salary arrears for seven and a half months, payment in lieu of notice, compensation for unfair termination, accrued leave, house allowance, and service pay. She therefore urged the Court to find that her termination was unlawful and unfair and to award her the total sum of Kshs. 11,900,500 along with costs and interest.

Respondent's submissions

31. The Respondent submitted that Section 9[2] of the Employment Act mandates that an employment contract for a term exceeding three [3] months must be in writing.

32. Furthermore, the recruitment and appointment processes at the Respondent University are governed by the Moi University Statutes, the Moi University Human Resource Policy Manual, and the Moi University Academic Staff

Appointment and Promotion policy, 2012. The instruments require that any successful candidate must be issued a formal letter of appointment signed by both the candidate and the University.

33. It was further submitted that the signed letter of appointment constitutes the official contract of employment, without which no legal employment relationship can be deemed to exist. The Claimant's reliance on score sheets and claim forms does not meet the threshold for proof of an employment contract envisaged under the Employment Act.
34. Duty under Section 107[1] of the Evidence Act lay on the Claimant to prove the existence of an employment relationship between her and the Respondent. In the circumstances of this matter, she didn't discharge the burden. Additionally, she didn't discharge the legal burden that Section 47[5], imposes on the employer in a dispute concerning termination of their employment. To support this point, reliance was placed on **Asakhulu v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 1 of 2023) [2024] KEELRC 705 (KLR)**.

35. The Respondent further argued that, without proof of employment, the Claimant's claim for unfair termination is one without foundation. To buttress this submission, the decision in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**

36. Consequently, the Respondent urged the Court to dismiss the Claimant's suit in its entirety.

Analysis and Determination

37. I have carefully considered the pleadings, evidence, and submissions by the parties herein, and the following issues emerge for determination:

- I. Whether the Claimant's claim herein is time-barred
- II. Whether the Claimant was employed by the Respondent
- III. Whether the Claimant's termination was unfair or unlawful

IV. Whether the Claimant is entitled to the reliefs sought

Whether the Claimant's Claim herein is time-barred.

38. It is essential to note that none of the parties has raised the issue. Nevertheless, it is a jurisdictional issue that clearly arises from the parties' pleadings, and this Court cannot ignore it solely because the parties have not explicitly raised it.

39. Section 89 of the Employment Act, 2007 provides;

“Notwithstanding the provisions of Section 4[1] of the Limitation of Actions Act [Cap. 22], no civil actions or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect, or default complained of, or in the case of continuing injury or damage, within twelve months next after cessation thereof.”

40. In her statement of claim, the Claimant averred;

“4. Sometimes in the month of January, 2019, when the new semester began, the claimant noticed that she had not been allocated any unit to teach by the Respondent. Upon seeking an audience from the Respondents, no explanation was forthcoming.”

41. In paragraph 5 of her witness statement turned evidence in chief, she stated;

“In January, 2019, I proceeded to work, but to my utter dismay, I found that all my units had been taken away from me and allocated to another lecturer.”

42. This Court further notes that on the letter dated 23rd September 2022, by Counsel for the Claimant addressed to the Respondent, it was stated;

“On or about January 2019, our client opted to leave the job, as there was no payment or communication coming from you. This callous attitude, as portrayed by yourself and or your agents, subjected our client and her family to mental anguish and untold suffering, as she is the only breadwinner for the family.”

43. Undoubtedly, the Claimant was consistent that the cause of action in respect of her suit arose in January 2019. The suit herein was filed on 22nd December 2022, approximately three years and eleven months after the cause of action accrued. As such, it is not challenging for this Court to conclude that the Claimant’s claim for unfair termination was filed out of the statutory period, and is hereby dismissed.

44. One would argue that the Claimant had sought remedies falling into two categories: firstly, those inherently linked to the claim for unfair termination, such as notice pay and compensation for unfair termination of employment under

Section 49(1)(c) of the Employment Act, 2007; secondly, those that are independent of the claim for unfair termination, and therefore, remain alive for consideration, even in cases where the claim is unsuccessful. Such remedies include an unpaid house allowance, compensation for earned but untaken leave days, and service pay.

45. I note that all remedies sought, which would be considered separate from the claim for unfair termination, were claimed as special damages. Therefore, the law required that they be specifically proved. I must conclude that they were neither proved as such nor at all. From the pleadings, it is clear that to arrive at the total figures sought under each head, the Claimant used a sum of KShs. 167,000 as her monthly salary. In my view, she did not establish that her monthly salary was KShs. 167,000, nor did she explain why she chose that figure. This Court has not overlooked her evidence during cross-examination, stating that she had no proof that this amount was her monthly salary, and that her salary varied each semester depending on the units she taught.

46. Having found on the jurisdictional issue, as I have hereinabove, I find it unnecessary to proceed to consider the other issues identified for determination hereinabove. The Claimant's claim is for dismissal. It is hereby dismissed.

Read, Signed and Delivered this 16th Day of March 2026.

OCHARO KEBIRA

JUDGE

ORIGINAL