Ndenyele v Moi University Coast Campus (Appeal E045 of 2025)
[2025] KEELRC 2205 (KLR) (24 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2205 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E045 OF 2025

M MBARŨ, J

JULY 24, 2025

BETWEEN

WILSON O NDENYELE ..... APPELLANT

AND

MOI UNIVERSITY COAST CAMPUS ..... RESPONDENT

(Being an appeal from the judgment of Hon. Gathogo Sogomo delivered on 21 February 2025 in Mombasa MCELRC No. 172 of 2018.)

JUDGMENT

1. The appeal arises from the judgment delivered on 21 February 2025 in Mombasa MCELRC No. 172 of 2018. The appellant is seeking that the judgment be set aside and his claim allowed, with payment for the balance of his salary, transport, and house allowances amounting to Ksh. 1,651,232, plus costs.
2. The background of the appeal is a claim filed by the appellant on 26 August 2018 on the basis that he was employed by the respondent on various yearly contracts from 2013/2014, 2014/2015, 2016/2017 in the sociology department to teach various subjects. The respondent agreed to pay him as follows:
    a. Ksh.1,000 per hour teaching,
    b. Ksh.1,000 per paper fr setting exams,
    c. Ksh.20 per script marking exams,
    d. Ksh.15,000 per month for transport and accommodation.
3. The claim was that he diligently performed his duties but was not paid for 39 hours per the subject per semester and transport;
    a. 2014/2015 39 hours at Ksh.39,000,

b. 2015/2016 39 hours at Ksh.39,000,

c. 2016/2017 39 hours at Ksh.39,000,

d. Sememebrs transport Ksh.15,000 x 3 months at ksh.45,000.

4. The total dues were Ksh.1,999,320, yet the respondent only paid Ksh.348,088 on 14 November 2024. The dues owed are Ksh.1,651,232, which should be paid along with costs.

5. In reply, the respondent denied the claim and stated that it had no contracts with the appellant as alleged. The respondent investigated the claim and established that the appellant was irregularly employed and there was no evidence of his employment as a part-time lecturer. The revised Moi University Policy on part-time lecturers specifies the terms and conditions for all foreign part-time lecturers. If the appellant offered any services to the respondent, such actions were illegal and irregular, contrary to the policy, and aimed at defrauding the respondent as a state corporation. The policy on part-time lecturers states that each part-time lecturer should teach only 3 units per semester to prevent complaints of poor quality teaching and grading. If the appellant taught the units as alleged, this was irregular, in violation of the policy, and a scheme to defraud the respondent. The rates applied by the respondent for part-time lecturers are:

a. Ksh.600 for a certificate,

b. Ksh.750 for a diploma,

c. Ksh.1,000 for undergraduate lecturers.

6. Each lecturer should teach 3 units per semester, and the claim cannot yield the exorbitant amounts claimed.

7. The learned magistrate heard the parties and, in the judgment, held that the appellant was employed by the respondent on fixed-term contracts based on the academic calendar. Each contract provided for the modalities of termination by effluxion of time, and hence the legality of the termination of employment should not arise, as each contract was spent. The appellant failed to tabulate his claim and applied a band of figures. Therefore, the claim was without merit and dismissed with costs.

8. Aggrieved by the judgment, the appellant has nine grounds that the trial court misapprehended the issue in dispute and erred in failing to make a finding on each claim. The appellant had pleaded and particularised his claim and how he arrived at each claim, which ought to have been analysed on the merits. The claims for the balance of salary, transport, and house allowances should be analysed and awarded.

Both parties filed written submissions.

9. The appellant submitted that his claim was based on the facts that he was employed part-time under a fixed-term contract for the academic years 2013 to 2017. His work was paid based on hourly rates, including setting examinations, script marking, as well as accommodation and transport. The claims under each category were specified.

10. The appellant submitted that there was an employer-employee relationship under which section 10(2) of the *Employment Act* (the Act) required the employer to describe the nature of duties and remuneration. In this case, the claimant had an hourly rate, examination scripts, and allowances for setting examinations, as well as transport and accommodation. All these terms were agreed under the fixed-term contract, and the respondent should not be allowed to negate it.

11. The burden of proof was on the respondent concerning the claims made, as held in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR. Based on the pleadings and the specific claims, the trial court should have analysed each claim on its merits, as held in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* HCCC No. 1243 of 2001, which states that parties are bound by their pleadings. The claims should be allowed with costs.

12. The respondent argued that the appellant's claim is based on allegations of unpaid salaries and allowances, which is not true. The appellant failed to prove his claims as required under Section 47 of the Act, preventing the respondent from justifying its position under Section 43 of the Act. The trial court correctly found that there was no proof and therefore dismissed the claims.

Determination

13. This is a first appeal. The court is required to reassess the record, review the findings, and make its conclusions. However, remember that the trial court had the opportunity to hear the witnesses.

14. In his claim, the appellant admitted that he was employed under yearly contracts from 2013 to 2017. The respondent's case was that where such employment existed, it was irregular and unprocedural, as there was a policy regarding the employment of part-time lecturers that was not adhered to; hence, this was deemed fraudulent.

15. The fact of employment is therefore not disputed. The employment was on fixed-term contracts. Where the appellant gained employment through irregular or fraudulent means, as alleged, the respondent did not address this.

16. The appellant served the respondent as a part-time lecturer. The relationship was regulated under fixed-term contracts.

17. Employment under fixed-term contracts is allowed under section 10(3) of the Act. It is a lawful and legitimate mode of employment.

    The claim was filed on 26 August 2018.

18. Under section 90 of the Act, each employment contract formed a distinct and separate employment relationship, each terminating by effluxion of time. At the end of employment in 2017, the appellant could only claim employment benefits under continuing injury within 12 months or for unfair termination of employment within 3 years. As held in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* [2016] KECA 213 (KLR), a claim based on allowances and benefits accruing monthly constitutes a continuing injury. It should be made within 12 months of the date of cessation. Additionally, in the case of *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR), the court examined the distinction between what constitutes a continuing injury and other employment benefits. The court emphasised that where there is a continuing injury or damage, the action must be commenced within twelve months after cessation.

19. Save for the service-level agreement attached to the Memorandum of Claim, which is not signed with dates, the only other document filed by the appellant as proof of employment is the demand letter dated 22 June 2018 and 8 May 2018. The first letter relates to claims accruing in 2014, while the second reiterates the earlier demands.

20. The other document filed relates to a schedule of external part-time applications dated 30 November 2016. The internal memo on part-time lecturing is general and not specific to the appellant.

21. Based on the given evidence, the claim filed on 26 August 2018 alleges that each employment period is distinct and separate from the others, and the court cannot discern when employment ceased during the 2016/2017 year of part-time lecturing.

22. The appellant testified that the respondent had a policy on part-time lecturing. He was supposed to teach 3 units, but the coordinator would ask him to take up extra courses. He was given a letter for the extra courses and was paid. He did not apply for the appointment because the coordinator would ask him to continue teaching as he awaited payment.

23. Where there was a contract for teaching in 3 units, each review ought to have been under a written agreement pursuant to section 10(3) of the Act. Without a written review of the fixed-term contracts, the appellant has no legal basis to claim extra work hours agreed upon between him and the coordinator. The legality of such an arrangement is removed under the policy that the appellant testified was within his knowledge.

24. Each contract having terminated on its terms, the claims going back 3 years from 26 August 2018 are time-barred as of 25 August 2015.

25. Equally, the continuing injuries for benefits accruing monthly lapsed within 12 months from the date of cessation. The court cannot ascertain from the pleadings or the witness statement the last day the appellant was on the shop floor.

26. The learned magistrate's findings that the appellant failed to discharge his burden of proof are correct, save as analysed in the appeal; the reasons are different. Each contract lapsed on its terms, and the claims for unpaid salaries, transport, and accommodation allowances, being continuing injuries, are without proof.

27. Accordingly, the appeal is without merit and is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA, THIS 24TH DAY OF JULY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....