



**Kimani v Maasai Mara University (Cause E003 of 2020)
[2024] KEELRC 775 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 775 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E003 OF 2020
DN NDERITU, J
APRIL 16, 2024**

BETWEEN

JOSEPH MWANGI KIMANI CLAIMANT

AND

MAASAI MARA UNIVERSITY RESPONDENT

JUDGMENT

I. INTRODUCTION

1. The claimant commenced this cause by way of a memorandum of claim dated 22nd September, 2020, filed in court on 23rd September, 2020, through Karia Kipkoge and Co. Advocates. As it is the procedure, the memorandum of claim is accompanied with a verifying affidavit sworn by the claimant on even date, the claimant's written witness statement, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following -
 - a. Unpaid wages - Kshs.915,050/=
 - b. Certificate of service
 - c. Interest on the above amount at court rates
 - d. Costs of the suit
3. The respondent appointed Alfred O. Nyabochwa, Advocate, its legal officer to act for it and filed a reply to the memorandum of claim on 26th November, 2020. The respondent is praying that the claim and prayers sought be dismissed with costs for lack of merits.



4. The respondent filed a list of witnesses, a list of documents and bundles of copies of the listed documents all dated 29th July, 2021 and filed in court on 2nd August, 2021 together with the witness statement of one Elkana Kimeli, the respondent's acting Finance officer.
5. The cause came up for hearing in open court on 22nd February, 2023 when the claimant testified and closed his case. The defence did not call any witnesses and closed its case on the same day. In closing its case the respondent's counsel stated that - "We do not wish to call any witnesses. We rely on the reply to the claim and the witness statements filed." This casual approach by the respondent has legal consequences as shall be seen in a subsequent part of this judgment.
6. It was by consent agreed that counsel for both parties file written submissions. Mrs Karia for the claimant filed her submissions on 18th April, 2023 while Mr. Nyabochwa for the respondent filed his submissions on 4th May, 2023.

II. THE CLAIMANT'S CASE

7. The claimant's case is expressed in the statement of claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by counsel. The same is summed up as hereunder.
8. In the memorandum of claim, the claimant avers that he was employed as a part-time lecturer by the respondent lecturing and teaching in certificate, diploma, and degree programmes from the year 2015. It is pleaded that the claimant taught at the main campus in Narok, the town campus, and in the Bomet satellite campus. He avers that he was engaged orally with the promise of a written contract by the end of the first semester that he taught, but this promise was not fulfilled by the respondent.
9. It is pleaded that at the beginning of the contract the respondent sent payments via the claimant's account but later failed and or refused to pay as initially agreed. The claimant pleads that he diligently offered lecturing services as a part-time lecturer. He claims for Kshs.915,050/= for services rendered as follows -

- a. Lecture per hour- Kshs.1,250(degree)
 - i. 39 hours x 1250= 48,750
 - ii. Exam setting- 1,500
 - iii. Exam invigilation at Kshs.750 per hour x 3 hours= 2250

Total per unit = Kshs.52,250

16 units x 52,250 = 836,000/=

- b. Certificate course Kshs.500 per hour

39 hours x Kshs.500 = Kshs.19,500 per semester

- i. Exam setting = Kshs.1,500
- ii. Exam invigilation at Kshs.750 per hour x 3 hours= 2250

Total = Kshs.23,250

- c. Transport Kshs.200 x 80= 16,000/= per semester



Kshs.16,000 x 3= 48,000/=

d. Marking scripts Kshs.20 per paper x 390

Plus transport = 48,000/=

Marking = 7,800/=

Total amount claimed is Kshs.915,050/=

e. Certificate of service

1. It is pleaded that despite demand made and notice of intention to sue given, the respondent failed and or refused to comply. The claimant avers that there is no other suit pending between the parties in any other court over the same subject matter.
2. In his testimony in court, the claimant reiterated the contents of the foregoing pleadings and his filed written statement filed on 24th September, 2020. He produced and adopted all the listed documents filed which were marked exhibits 1 to 6. He stated that he worked for the respondent based on an oral contract. He stated that the Dean of the Business School allocated him teaching units and lessons as per the timetable of the department which is in the custody of the respondent.
3. He avers that he taught at the main campus in Narok Town, and in Bomet satellite campus, in certificate, diploma, and degree courses. He testified that he was in the financial management department and produced exhibits 1 to 6 as evidence of confirmation that he actually rendered the services as pleaded. He reiterated that he is claiming for a sum of Kshs.915,050/= plus costs and interest, and a certificate of service.
4. In cross-examination, he stated that he is currently working at Nyandarua National Polytechnic as an employee of the Public Service Commission.
5. He insisted that he was engaged by the Dean of the School of Business on behalf of the respondent by way of an oral agreement and that he was not issued with a letter of appointment. The terms of the contract were that he was to teach and be paid as per his filed returns authenticated by the attendance sheets and the exam marking returns. He stated that he executed his duties as agreed and expected. He reiterated that he taught the units set out in paragraph 8 of the memorandum of claim.
6. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. THE RESPONDENT'S CASE

16. The respondent's case is contained in the reply to the memorandum of claim and the written submissions by its counsel, as summarized hereunder.
17. In its response to the claim the respondent denied the entire claim in toto but in very general terms. It is denied that the claimant was a part-time lecturer providing services to the respondent as claimed and that the claimant taught the subjects and units as set out in the memorandum of claim.



18. The respondent denies owing the claimant in the sum of Kshs.915,050/= as claimed or in any other money or at all. The respondent avers that it is a stranger to the rates and the calculations captured in the memorandum of claim.
19. The respondent did not call any witnesses but instead purported to rely on the response to the claim, the filed witness statement, and the filed documents. It is important to note at this juncture that neither the witness statements nor the documents were admitted as evidence by consent or in any other manner. The court shall deal with this issue in a succeeding part of this judgment.
20. It is on the basis of the foregoing that the respondent prays that the claimant's cause be dismissed with costs. The submissions by counsel for the respondent shall be considered in a succeeding part of this judgment alongside those by counsel for the claimant.

IV. SUBMISSIONS BY COUNSEL

21. On the one hand, the claimant's counsel identified two major issues for determination- What were the terms of employment for the claimant by the respondent? And, Is the claimant is entitled to the reliefs sought?
22. On the first issue, it is submitted that the claimant has demonstrated and proved that he was the respondent's employee as a part-time lecturer on an oral contract running from 2015 to 2018. Counsel cited section 2 of the *Employment Act* (the Act) and argued that the claimant was validly employed under an oral contract of service. Counsel also cited section 9(2) of the Act and submitted that it was the employer's responsibility to reduce the terms of the employment into a written contract for the employee to sign. It is submitted that the respondent failed in that legal duty and obligation.
23. It is submitted that an employee is entitled to fair labour practices including a right to fair remuneration for work done and counsel has cited Article 41 of *the Constitution* in support of that position. Further, counsel argues that the claimant having worked diligently for the respondent for the entire period alluded to above, he is entitled to agreed or reasonable pay for the services rendered and offered to the respondent at its behest, instant, and request. It is, therefore, submitted that the respondent is in violation of the claimant's rights to fair remuneration and fair labour practices.
24. It is also submitted that the claimant is entitled to payment of the wage arrears illegally withheld by the respondent for the services rendered in accordance with section 17 of the Act.
25. It is submitted that the respondent's failure to pay the claimant is against the doctrine of legitimate expectation and counsel has cited the cases of Simon Ndicu vs Karatina University Nairobi ELRC Cause No. 755 of 2018 and Council of Civil Service Unions vs Minister for the Civil Service [1984] 2 ALL 935.
26. Last but not least, counsel submits that sections 10 and 74 of the Act require an employer to keep records of employment and to avail the same for examination by a labour office or by the court in court proceedings. It is submitted that it is only through such records that the court may verify the authenticity of the terms of employment. It is submitted that the respondent has deliberately failed to avail such records and as such the evidence of the claimant stands unchallenged.
27. On the purported evidence by the respondent, it is submitted that the witness statement and the documents filed in court were not properly produced and the court is urged to disregard the same all together.
28. On the other hand, counsel for the respondent did not identify issues of determination but submitted that the claimant has not shown any communication between himself and the Dean of the School



of Business of the respondent in regard to his appointment nor has he established the basis of the purported oral terms of engagement. Further, it is submitted that in the absence of the employment contract the authenticity of the claimant's claim is denied and not proved.

29. Counsel has cited section 107 of the *Evidence Act* to the effect that he who alleges must prove. It is urged that the claimant did not produce evidence to prove the existence of the employment relationship between him and the respondent.
30. Counsel submits that although the respondent did not call any witness, but instead relied on the witness statement of Elkana Kimeli and the filed documents, the court should rely on the said witness statement and admit them as they were allegedly produced with the consent of the claimant's counsel.
31. It is submitted that the claimant would have been entitled to Kshs.320,267.50 if he proved that he was engaged by the respondent as alleged.
32. In conclusion, it is submitted that the claimant has failed to establish that he had an employment relationship with the respondent of whatever nature and as such the court is urged to dismiss the cause with costs.

V. ISSUES FOR DETERMINATION

33. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered, and the written submissions by counsel for both parties. The court identifies the following issues for determination -
 - a. Was there a contract of employment between the claimant and the respondent and what were the terms thereof?
 - b. Is the claimant entitled to the reliefs sought?
 - c. Who should bear the costs of the cause?

VI. EMPLOYMENT

34. Section 2 of the Act defines a contract of service as "an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies."
35. Section 8 of the Act provides that "The provisions of this Act shall apply to oral and written contracts".
36. Section 9 (1) and (2) of the Act further provides as follows -
 - (1) A contract of service—
 - (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
 - (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.



- (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

37. From the provisions above, a contract of service can either be oral or written. It is the legal duty and obligation of an employer to ensure that an oral contract of service is reduced to writing.

38. The claimant's case is that he was orally engaged by the respondent as a part-time lecturer for the period from 2015 to 2018 teaching in the main campus in Narok Town and the Bomet satellite campuses. The payment rates were agreed as set out in paragraph 8 of the memorandum of claim as follows -

a. Lecture per hour- Kshs.1,250

i. 39 hours x 1250= 48,750

ii. Exam setting- 1,500

iii. Exam invigilation at Kshs.750 per hour x 3 hours= 2250

Total =Kshs.52,250 per unit

52250 x 5=Kshs.261,250 for 5 units

b. Transport Kshs.200 x 80 = 16,000/= per semester

16,000 x 2 = Kshs.32,000/=

c. Marking scripts Ksh.20 per paper x 33= 660

261,250+Ksh 32(transport)+ Marking

Total amount= Kshs.293, 910/=

d. Certificate of service

1. Further, the claimant produced class and examination attendance lists, continuous assessment tests (CATs) records, timetables, and other records of his work in court. From the said records, it is evident that the claimant taught and lectured in different courses including purchasing management, financial economics, manpower planning, business communication, and business management, among others.
2. On the other hand, the respondent as the custodian of employment records did not avail any records to counter those availed and produced by the claimant. This court takes the view and holds that the claimant did not certainly go out of his way to manufacture the said records. Having disputed and denied the claim the respondent ought to have availed records to prove that indeed the claimant did not teach the impugned courses and that indeed another individual taught the same or indeed that no such courses as alleged by the claimant were offered by the respondent as and at the time as alleged by the claimant.
3. As noted above, no evidence was tendered from the respondent and no exhibits were produced to counter those availed by the claimant. It is not true, and it is misleading



for counsel for the respondent to allege that a witness statement by one Elkana Kimeli was produced by consent. For clarity, a witness statement is just a guideline on what the intended witness will tell the court when such witness shall appear in court. This is an innovation of fair hearing in the era of disclosure as entrenched in *the Constitution*. A witness statement filed does not and cannot of itself amount to the evidence of the intended witness unless so admitted by consent and with concurrence of the court. What becomes evidence is what a witness states in court which is obviously subjected to cross-examination to test the veracity and admissibility of such evidence.

4. Likewise, documents filed in court do not become evidence unless produced by consent or through a competent witness and then subjected to the tests of admissibility by the court as so well laid out by the Court of Appeal in *Kenneth Nyaga Mwigie V Austin Kiguta & 2 Others (2015) eKLR*. The witness statement of Elkana Kimeli and the alleged minutes listed as an intended exhibit were neither produced nor admitted or marked as exhibits on record and they remain mere papers in the court file. They add no value to the respondent's case.
5. Section 119 of the *Evidence Act* provides that -

“The Court may presume the existence of any fact which it thinks likely to have happened, regard being to the common course of natural events, human conduct and private and public business, in relation to the facts of the particular case”

44. From the entire evidence tendered and the circumstances of this cause, the court finds and holds that there existed an oral contract of service between the claimant and the respondent as pleaded. Deliberately, fraudulently, intentionally, or otherwise the respondent failed and or refused to reduce the contract in writing. However, that misconduct on the part of the respondent did not invalidate or render the contract moot. This is a civil cause and on a balance of probabilities, more so after the respondent failed to avail any records to counter those availed and produced by the claimant, the court finds and holds that the claimant proved his claim to the required standards.

VII. RELIEFS

45. In the memorandum of claim and in his oral testimony in court, the claimant demonstrated how the figure of Kshs.915,050/= is arrived at being the wages for lecturing services that he offered at the behest, instant, and request of the respondent. Further, as stated above, the respondent did not tender any evidence to dislodge or dispute the claim. The claimant is awarded the above sum as claimed.
46. On the claim for a certificate of service, the court is guided by section 51 (1) of the Act which provides that - An employer shall issue to an employee a certificate of service upon the termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. This prayer is allowed as hereunder.

VIII. COSTS

47. The claimant is awarded the costs of the cause.

IX. DISPOSAL

48. In the disposal of this cause, the court issues the following orders in favour of the claimant -



- a. Unpaid wages Kshs.915,050/=.
- b. The above amount shall earn interest at court rates from the date of this judgment till payment in full.
- c. The respondent shall issue and deliver to the claimant a certificate of service within 30 days of this judgment.
- d. Costs of the cause and interest thereon to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 16TH DAY OF APRIL, 2024.

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DAVID NDERITU

JUDGE

ELRC CAUSE NO. E003 OF 2020 14 | PAGE

