



**Chepkemoi v Maasai Mara University (Cause E001 of 2020)
[2024] KEELRC 774 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 774 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E001 OF 2020
DN NDERITU, J
APRIL 16, 2024**

BETWEEN

PENVILLIA CHEPKEMOI 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 Kipkogei 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. The claimant filed a further list and bundle of documents on 3rd June, 2021 alongside a supplementary list and witness statements by Peter Kiplangat Cheruiyot, Caroline Chepkoech, and Wesley Ruto, all former students of the respondent who were taught by the claimant.
2. The claimant is seeking for judgment against the respondent for -
 - a. Unpaid wages - Kshs.293,910/=
 - b. Certificate of service
 - c. Interest on the above amount at court rates
 - d. Costs of the suit
3. The respondent, through Alfred O. Nyabochwa, Advocate, its legal officer, entered appearance on 12th November, 2020 and filed a reply to the memorandum of claim on 27th November, 2020. The respondent prays that the entire claim be dismissed with costs for lack of merits.



4. The respondent filed a list of one witness, a list of one document, and a copy of the listed document, all dated 29th July, 2021 and filed in court on 2nd August, 2021 together with the witness statement of Elkana Kimeli, acting finance officer of the respondent.
5. This cause came up for virtual hearing on 9th March, 2023 when the claimant testified virtually from Michigan University in the United States of America. By consent of counsel for both parties, the witness statements of the three witnesses named above were adopted and admitted in evidence and the documents listed in her two filed lists were produced as exhibits 1 to 9, thereafter the claimant closed her case.
6. The defence did not call any witnesses and closed its case on the same date. In closing its case, the respondent's counsel stated that "We are not calling any witness for the respondent. We wish to rely on the response to the claim and the witness statement of Elkana Kimeli and the one document attached being minutes of a special academia board meeting held on Saturday, 26th May, 2012." To the foregoing, counsel for the claimant responded "No objection." The court therefore recorded that the witness statement by Elkana Kimeli and the above stated document were admitted in evidence by consent of both counsel for the parties.
7. It was by consent agreed that counsel for both parties file written submissions. Mrs Karia for the claimant filed her written submissions on 11th May, 2023 while Mr. Nyabochwa for the respondent filed his submissions on 4th April, 2023.

II. The Claimant's Case

8. 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 her counsel. The same is summed up as hereunder.
9. In the memorandum of claim, the claimant avers that she 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 the Bomet satellite campus. She avers that she was engaged on an oral contract which the respondent promised to reduce in writing but the respondent failed, refused, and or neglected to do so.
10. In paragraph 7 of the memorandum of claim the claimant has listed the courses that she taught and lectured for the period that she was engaged, complete with their official names and codes. In paragraph 8 the claimant has set out the basis, particulars, and computation of her entire claim of Kshs.293,910/=.
11. In her testimony in court, the claimant reiterated the contents of the foregoing pleadings and her filed written statement. She produced and adopted all the listed documents and filed which were marked exhibits 1 to 9. The statements of the other witnesses were produced and admitted in evidence by consent of counsel for both parties with concurrence of the court.
12. The claimant stated that she worked for the respondent as a part-time lecturer from May to December, 2015, and partly (units) in 2016, teaching in the courses listed in paragraph 7 of the memorandum of claim and the pay-rates applicable are those stated in paragraph 8 thereof. In cross-examination she maintained her afore-stated testimony and proclaimed that she is genuinely owed by the respondent as per the claim.
13. The witness statements by the former students who were taught by the claimant point out to the fact that indeed the claimant taught and lectured as alluded to and pleaded.



14. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in her favour as prayed in the memorandum of claim. The submissions by her counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

15. The respondent's case is contained in the reply to the memorandum of claim, the statement of Elkana Kimeli, acting finance officer, the exhibit marked 1, and the written submissions by its counsel, as summarized hereunder.
16. In its response to the claim the respondent denied the entire claim in toto. 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 as set out in the memorandum of claim.
17. The respondent denies owing the claimant in the sum of Kshs.293,910/= as claimed or in any other sum of money or at all. The respondent avers that it is a stranger to the rates and the calculations captured in the memorandum of claim.
18. The respondent did not call any witnesses but instead relied on the response to the claim, the filed witness statement, and the filed document. The said witness statement and the exhibit were admitted in evidence by consent of both counsel as noted in an earlier part of this judgment.
19. The said witness alleges in the statement that the claimant did not teach because she does not hold a letter of appointment and that there is none in the records of the respondent. It is important to comment that the allegations in the said statement were not subjected to cross-examination as Elkana Kimeli did not attend court; also the purported exhibit availed in court does not bear any signature of any of the persons alleged to have attended the subject meeting. The said document is of no evidential value.
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 the 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 entitled to the reliefs sought?
22. Counsel submitted that the documentary evidence filed by the respondent is not admissible in evidence as the same, if at all, was produced un-procedurally. It is submitted that the statement of the intended witness, Elkana Kimeli, adds no value to the respondent's case as he did not attend court to testify in line of the said statement. In regard to the document filed, minutes of a meeting purportedly held on 26th May, 2012, no witness, let alone the maker thereof, came to court to produce the same as an exhibit. In any event, it is further submitted, the alleged minutes are not signed and or authenticated.
23. Counsel has cited *Kenneth Nyaga Mwige V Austin Kiguta & 2 Others (2015) eKLR* on the steps and procedures of production of documentary evidence before the same is admitted as an exhibit and finally admitted as evidence. The court is urged to ignore the witness statement by Elkana Kimeli and the minutes alluded to above altogether and find that they do not constitute evidence from the respondent. The court shall comment on this issue in the following paragraphs of this judgment.



24. On the first issue, it is submitted that the claimant was the respondent's employee as a part-time lecturer. Counsel has cited Sections 2 & 9(2) of the Employment Act (the Act) and submitted that it is always an employer's responsibility to reduce the terms of the employment in a written contract and ensuring that the same is properly executed by the parties. It is submitted that the respondent failed in that legal duty and obligation for the period served by the claimant.
25. 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, she is entitled to the 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.
26. It is further submitted that the claimant is entitled to payment of wage arrears illegally withheld by the respondent for the services rendered in accordance Section 17 of the Act.
27. 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 in firming up that argument.
28. Last but not the least, counsel submits that Sections 10 and 74 of the Employment Act require that an employer keeps records of employment and to avail the same for examination by a labour officer or by the court in court proceedings. 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.
29. On the other hand, counsel for the respondent did not identify issues for determination but submitted that the claimant has not proved working for the respondent as pleaded and claimed. Further, it is submitted that in the absence of a contract of employment or letters of appointment, the authenticity of the claimant's claim is denied and not proved.
30. 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 herself and the respondent.
31. Counsel submits that although the respondent did not call any witness but instead relied on the witness statement of Elkana Kimeli and the filed document, the court should rely on the same and admit them as they were produced with the consent of the claimant's counsel.
32. It is submitted that the claimant would have been entitled to Kshs.102,868.50 had she proved that she was engaged by the respondent as alleged and claimed.
33. In conclusion, it is submitted that the claimant has failed to establish that she 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

34. 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

35. 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.”
36. Section 8 of the Act provides that “The provisions of this Act shall apply to oral and written contracts”.
37. 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).
38. 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.
39. The claimant’s case is that she was engaged by the respondent as a part-time lecturer in 2015. It is the claimant’s evidence that the respondent did not issue her with a letter of appointment, either by design and or fraudulently, with the intention of denying her and other part-timers their lawful dues. However, her payment rates were agreed as set out in paragraph 8 of the memorandum of claim
40. Further, the claimant produced class and examination attendance lists, continuous assessment tests (CATs) records, timetables, and other records of her work, as were in her possession, in court. From the said records, it is evident that the claimant taught and lectured in various courses and the statements from three of the students that she taught were, as noted above, admitted in evidence by consent.
41. 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 her way to manufacture the said records. The respondent, since it disputed and denied the claim, ought to have availed records to prove that indeed the claimant did not teach the impugned courses and or that indeed another individual taught the same and or indeed that no such courses as alleged by the claimant were offered by the respondent as and at the time alleged by the claimant.
42. As noted above, the statement by Elkana Kimeli, the intended witness for the respondent, contained what is ordinarily referred to as mere denial. This witness did not attend court for his evidence to be subjected to cross-examination. For clarity and avoidance of ambiguity, a witness statement is just a



guideline on what the intended witness will tell the court. It 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 the 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 thereof. Truly speaking therefore, although admitted by consent of both counsel, the witness statement alluded to above added no value to the respondent's case.

43. 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 Mwigye V Austin Kiguta & 2 Others* (2015) eKLR. While the witness statement of Elkana Kimeli and the alleged minutes listed as an intended exhibit were admitted on record by consent, they in my opinion added no value to the respondent's case.
44. 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”
45. 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. This is a civil case 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 has proved her claim to the required standards.

VII. Reliefs

46. In the memorandum of claim and in her oral testimony in court, the claimant demonstrated how the figure of Kshs.293,910/= is arrived at being the wages for lecturing services that she offered at the behest, instant, and request of the respondent. Further, as stated above, the respondent did not tender evidence to dislodge or dispute the claim. The claimant is awarded the above sum as claimed.
47. On the claim for 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 request is allowed as hereunder.

VIII. Costs

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

IX. Disposal

49. In the disposal of this cause, the court issues the following orders in favour of the claimant -
 - a. Unpaid wages Kshs.293,910/=.
 - 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

