



**Omwoyo v Maasai Mara University (Cause E002 of 2020)
[2024] KEELRC 995 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 995 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E002 OF 2020
DN NDERITU, J
APRIL 16, 2024**

BETWEEN

DUKE MOSOTI OMWOYO 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.1,624,050/=
 - 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 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 Elkana Kimeli, acting finance officer of the respondent.
5. This 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 date. In closing its case, the respondent's counsel stated that

" We do not wish to call any witnesses, we close the respondent's case. We rely on the response to the claim and witness statement and one attachment."

This casual approach to the cause 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 written 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 2011. It is pleaded that the claimant taught at the main campus in Narok, the town campus, and the Bomet satellite campus. He avers that he was initially issued with a written contract at the beginning of each academic year but around 2014/2015 the respondent deliberately, intentionally, and or fraudulently stopped issuing him with the written contracts but nonetheless he continued to offer his lecturing and teaching services on the already agreed and established terms and conditions.
9. The claimant produced as exhibits sample letters of engagement for the period 2012 and 2013.
10. In paragraph 7 of the memorandum of claim the claimant has listed the courses that he taught and lectured in the period from September, 2015 to December, 2017, complete with their official names and codes. In paragraph 8 the claimant has set out the basis and computation of his entire claim of Kshs.1,624,050/=.
11. In his testimony in court, the claimant reiterated the contents of the foregoing pleadings and his filed written statement. He 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 he worked for the respondent as a part-time lecturer from 2011 to 2020 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 he maintained his afore-stated testimony and proclaimed that he is genuinely owed by the respondent as per the claim.
13. 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

14. The respondent's case is contained in the reply to the memorandum of claim and the written submissions by its counsel, as summarized hereunder.
15. 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.
16. The respondent denies owing the claimant in the sum of Kshs.1,624,050/= or any other money or at all as claimed. The respondent avers that it is a stranger to the rates and the calculations captured in the memorandum of claim.
17. 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 document. It is important to note at this juncture that neither the witness statements nor the document were admitted as evidence by consent or in any other lawful manner. The court shall deal with this issue in a succeeding part of this judgment.
18. 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

19. 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?
20. 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.
21. 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.
22. On the first issue, it is submitted that the claimant was the respondent's employee as a part-time lecturer from 2011 to 2020. Counsel has cited section 2 of the *Employment Act* (the Act) and argued that the claimant, even after the respondent stopped issuing written appointments, continued to serve on the same agreed terms and conditions of the contract of service. Counsel has also cited section 9(2) of the *Act* and submitted that it is always an 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 for the period served from 2014 onwards.
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 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.
24. It is also 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.
 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 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.
 27. On the other hand, counsel for the respondent did not identify issues of determination but submitted that the claimant has not proved serving the respondent from 2014 onwards. Further, it is submitted that in the absence of the employment contract or letters of appointment after 2014 the authenticity of the claimant's claim is denied and not proved.
 28. 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 himself and the respondent after 2014.
 29. 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 allegedly produced with the consent of the claimant's counsel.
 30. It is submitted that the claimant would have been entitled to KShs.568,417.50 if he proved that he was engaged by the respondent as alleged.
 31. In conclusion, it is submitted that the claimant has failed to establish that he had an employment relationship with the respondent of whatever nature after 2014 and as such the court is urged to dismiss the cause with costs.

V. Issues for Determination

32. 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, after 2014, 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

33. 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."

34. Section 8 of the Act provides that

" The provisions of this Act shall apply to oral and written contracts."

35. 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).

36. 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.

37. The claimant's case is that he was initially engaged by the respondent as a part-time lecturer from 2011 as per the various letters of appointment produced as exhibits. It is the claimant's evidence that for the period from 2014 to 2020 the respondent did not issue letters of appointment allegedly by design and or fraudulently with the intention of denying him and other part-timers their lawful dues. However, his payment rates had been agreed as set out in paragraph 8 of the memorandum of claim

38. Further, the claimant produced class and examination attendance lists, Continuous Assessment Tests (CATs) records, timetables, and other records of his work, as were in his 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 he taught were, as noted above, admitted in evidence by consent.

39. 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. 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.

40. 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 Elkana Kimeli was produced by consent. 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.

41. 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 Mwige 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.

42. 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”

43. From the entire evidence tendered and the circumstances of this cause, the court finds and holds that there existed a 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 his claim to the required standards.

VII. Reliefs

44. In the memorandum of claim and in his oral testimony in court, the claimant demonstrated how the figure of Kshs.1,624,050/= 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.

45. 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

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

IX. Disposal

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

- a. Unpaid wages Kshs.1,624,050/=.
- 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

