



**Mumma v Maasai Mara University (Cause 1152 of 2015)
[2023] KEELRC 750 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 750 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1152 OF 2015
JK GAKERI, J
MARCH 23, 2023**

BETWEEN

DR SOLOMON MUMMAH CLAIMANT

AND

MAASAI MARA UNIVERSITY RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim filed on July 2, 2015 alleging that the Respondent owed him several accrued contractual claims.
2. It is the Claimant's case that he was employed by the Respondent as a Senior Lecturer on October 1, 2012 on permanent and pensionable terms. That it was a contractual term that a party wishing to terminate the contract of employment was required to serve a 3 months' notice.
3. The Claimant avers that he tendered his resignation on July 15, 2013 and the Respondent allowed him to serve until October 15, 2013.
4. That the Respondent acknowledged the resignation letter on September 4, 2013 and the Claimant was denied the right to serve until expiry of the notice.
5. That the Claimant's pay slip for 2013 showed zero salary for August 2013 and demand for his dues was not responded to.
6. The Claimant prays for;
 - a. 2 month's salary in lieu of notice
 - b. Accrued contractual claims of Kshs.765,853/= composing;
 - i. Salary for August 2013 Kshs.184,164/=



- ii. Honoraria claim Kshs.6,000/=
- iii. Part time teaching claims Kshs.240,000/=
- iv. Pension claims Kshs.284,834/=
- v. Passage and baggage allowance Kshs.18,000/=
- vi. Insurance claim refunds:

Co-operative Insurance Kshs.17,855/=British American Kshs.15,000/=

Total Kshs.765,853.00

- c. Interest on (a) and (b) at court rates.
- d. Any other or further reliefs this court may deem fit to grant.

Respondent's case

7. In its statement of response filed on September 10, 2015, the Respondent admits that the Claimant was its employee but denies the three months' notice period.
8. It is the Respondent's case that it reserved the right to vary the notice period and denies owing the Claimant any dues.
9. The Respondent avers that the Claimant was employed on permanent and pensionable terms with a monthly salary with no honorarium, was not a part-time lecturer, did not take part-time classes and pension claims ought to be made to the pension scheme.
10. The Respondent urges the court to dismiss the suit with costs.
11. In its Amended Defence filed on November 20, 2020, the Respondent states that it did not exist on October 1, 2012 and was awarded a Charter in 2013, yet admits that the Claimant rendered services contracted by the predecessor.
12. It is the Respondent's case that the Claimant's resignation was immediate and it had to procure a replacement as the Claimant stayed away. That his letter had no notice period and was not entitled to any salary after resignation. The Respondent further avers that the honorarium payment was discretionary and only lecturers who were not part of the University academic staff participated in part-time teaching.

Claimant's evidence

13. The Claimant's written statement dated October 22, 2021 rehashes the contents of the statement of claim save for the addition that the Respondent had at the instigation of the Claimant undertaken to deduct the sum of Kshs.3,500/= and Kshs.3,000/= per month and remit the same to Co-operative Insurance and Britam respectively.
14. On cross-examination, the Claimant testified that he joined Narok University on October 1, 2012 but sued the University as it was the existing University and had not explained the relationship between the two. He denied having sued an entity he had neither a relationship nor contract with.
15. He confirmed that his resignation letter had no length of notice. That his last day at work was September 4, 2017 but had no evidence that he was at the University on the date the examination was administered.



16. That he learnt of the replacement on August 21, 2013 and the Deputy Vice Chancellor Academic had intimated that that was not the case.
17. The Claimant could not explain what the honorarium he was claiming was about.
18. The witness testified that although he was a permanent and pensionable member of the academic staff, he was offered and accepted part-time teaching at the University and the contract did not lapse in May 2013 and had actionables such as teaching, examination, invigilation and making a total of Kshs.240,000/=.
19. It was the Claimant's testimony that the Respondent operated a contributory medical scheme.
20. On re-examination, the witness testified that Narok University College and Massai Mara University were one and the same entity and the Respondent responded to his resignation letter and he continued executing his duties as a lecturer as he moderated and conducted examinations.
21. It was his testimony that he had discharged his obligations as expected.

Respondent's evidence

22. On the hearing date, counsel for the Respondent asked for an adjournment so as to call his witness but was unable to and hearing was postponed to September 20, 2022 on which date his witness could not be reached as she was away from the Institution and sought an adjournment. Counsel for the Claimant objected. The court granted the last adjournment and awarded the days costs to the Claimant.
23. On December 5, 2022 counsel for the Respondent informed the court that the witness was taking the KASNEB examination and thus not available.
24. Counsel tendered no evidence in support of his application for a further adjournment which the Claimant's counsel objected to and the court was in agreement with the Claimant's counsel. Consequently, the Respondent did not adduce evidence in support of its averments.
25. The court accorded the parties 14 days a piece to file and serve submissions.

Claimant's submissions

26. The Claimant's counsel submitted that the Claimant had discharged the burden of proof for payment of the terminal dues claimed.
27. As regards the salary for August, 2013 counsel argued that the Claimant served the resignation notice in accordance with the Respondent's policy ,discharged his obligations and conducted an examination on August 30, 2013.
28. Counsel submitted that the Claimant received a response to the resignation letter on September 4, 2013 and was not paid for the month of August 2013.
29. Counsel argued that the Respondent did not render evidence to show that the Claimant did not render services in August 2013.
30. As regards 2 month's salary in lieu of notice, counsel urged that under the Terms and Conditions of Service, the Claimant was obligated to give 3-months' notice or 3 months' pay in lieu and the Respondent admitted the same in its amended statement of defence in paragraph 2 (c) and 2 (d). Counsel urged that the Respondent had no option but to either allow the Claimant serve the notice period or pay him the amount due and was thus bound to pay the remaining two month's salary.



31. As regards part-time teaching, counsel submitted that the Claimant was appointed as a part-time lecturer for the May 2013 – August 2013 semester to teach Courses EGC 820 and PSH 812 for 13 weeks, a minimum of 35 contact hours and the letter was signed by Professor Gerald N. Kimani, Ag. Deputy Vice – Chancellor (A&F) and the Claimant acted accordingly.
32. Counsel relied on Clause 12.3 of the Respondent’s Terms of Service to urge that the Claimant was entitled to Passage and Baggage allowance of Kshs.18,000/=.
33. As regards the claim for Honorarium, counsel submitted that the Respondent had not adduced evidence to controvert the Claimant’s claim for honorarium as an external examiner in accordance with the letter dated November 1, 2012, the sum of Kshs.4,450/=.
34. As regards insurance refunds, counsel submitted that the Respondent deducted the sums from the Claimant’s salary but did not remit the same to the respective insurance companies.
35. As regards the Respondent’s failure to adduce evidence, counsel submitted that the evidential burden shifted to the Respondent to disprove the Claimant’s evidence and had not provided any oral or documentary evidence and thus the Claimant’s evidence was uncontroverted.
36. Reliance was made on the sentiments of the court in Kenya Power and Lighting Company Limited V Rassul Nzembe Mwadzaya (2020) eKLR on the place of averments without supportive evidence.

Respondent’s submission

37. The Respondent’s counsel addressed three issues namely; whether the Claimant was an employee of the Respondent, whether the Claimant provided sufficient notice period and the dues prayed for.
38. As regards the first issue, counsel submitted that since the Claimant was employed by Narok University College, there was not employee/employer relationship between the Claimant and the Respondent.
39. That the Claimant was appointed not employed and the terms of appointment were governed by the Terms of Service as opposed to the *Employment Act* and the court had no jurisdiction in the matter as ordained by Article 162 (2) of the *Constitution* of Kenya, 2010.
40. As regards notice period, counsel submitted that the two letters relied upon by the Claimant were different as one had no acknowledgement by the University and they had different signatures, and thus a fabrication to mislead the court. Counsel urged that the documents be expunged for want of veracity.
41. Counsel submitted that the Claimant had omitted paragraph 6 of the Terms of Service in both bundle of documents on the 3 months notice period.
42. That the list of documents on record had no clauses on termination of employment to justify 3 months notice and Section 28 of the *Employment Act, 2007* should apply.
43. Counsel urged that the notice neither specified the duration nor the law relied upon. According to counsel, the resignation notice was framed in the present tense and had no end date and the Respondent could lodge a counter-claim for insufficient notice as any number of days could be implied and the Respondent was entitled to fill the vacancy. The decision in Kenneth Onialo V Majlis Resort Lamu t/a Majlis Lamu Ltd (2022) eKLR was relied upon to buttress the submissions.
44. On part-time teaching, counsel urged that the Claimant had not adduced evidence that he fulfilled his part of the contract.
45. That the Claimant signed the contract of engagement after the May-August Semester.



46. Reliance was made on the provision of Section 70 of the *Evidence Act* on proof of signature.
47. Counsel urged that the Claimant's claim for unpaid part-time dues was inconsistent with his position as a full time employee of the Respondent and the contract was executed after he had already resigned.
48. Counsel submitted that the honorarium claimed was discretionary. That the letter dated June 2, 2014 was not a report and the same was not delivered to it.
49. As regards Passage and Baggage allowance, counsel urged that the same was unavailable to employees who had not given proper notice and the Claimant did not clear with the University.
50. Counsel submitted that the court had no jurisdiction to award pension.
51. On failure to call evidence, counsel submitted that the burden of proof lay on the Claimant throughout the trial. That the Claimant had failed to discharge the evidential burden of proof. That the absence of evidence did not warrant entry of judgement.
52. The Court of Appeal decision in *Charterhouse Bank Ltd (under statutory management) V Frank N. Kamau (2016) eKLR* was relied upon to exemplify the burden of proof of the Plaintiff in the absence of the Respondent's evidence.

Determination

53. The issues for determination are:
 - i. Whether the Claimant was an employee of the Respondent.
 - ii. Whether the Claimant gave sufficient resignation notice.
 - iii. Whether the Claimant is entitled to the dues prayed for.
54. As regards employment, the Respondent submitted that the Claimant was appointed by Narok University College by virtue of a letter of appointment and thus no employment relationship existed between the Claimant and the Respondent and this court had no jurisdiction to determine the suit.
55. The court is not persuaded by the Respondent's counsel's argument for various reasons among them the fact that the Respondent admitted the fact that the Claimant was its employee. Paragraph 2(b) of the Respondent's Amended Statement of Defence is unambiguous that "The Respondent admits the contents of paragraph 3 of the statement of claim in part . . ."
56. By its own word, the Respondent admitted that it employed the Claimant on October 1, 2012 as a Senior Lecturer, Grade 13 on Permanent and Pensionable terms.
57. Similarly, the Respondent responded to the Claimant's Notice of resignation.
58. Finally, other documents on record including copies of payslips which the Respondent did not object to show that the Claimant was indeed an employee of the Respondent.
59. The fact that the Respondent obtained a Charter in 2013, which was not demonstrated by evidence and did not disprove the fact that the Respondent commenced its operations as a University College.
60. Section 2 of the *Employment Act, 2007* defines employee as a person employed for wages or salary and includes an apprentice and indentured learner. An Employer is defined variously and includes a public body such as the Respondent.



61. For the foregoing reasons, it is the finding of the court that the Claimant was an employee of the Respondent.
62. As regards resignation notice, parties had adopted opposing positions. Regrettably, none of the parties furnished evidence in support of their position. The Respondent filed two copies of the letter dated July 15, 2013. The copy filed on July 2, 2015, had no receipt stamp while the copy filed in October 2021 has. The signatures differ.
63. Although the Respondent's counsel submitted that the Claimant fabricated the letter, he tendered no evidence to substantiate the allegation.
64. The resignation letter is silent on the notice period nor the Claimant's last day of service.
65. Both parties invited the court to accept their respective position, but without supportive evidence, the court is not amenable to such invitation. According to the Claimant, he gave notice as per the law provided. The letter makes no reference to the Terms of Service or Policy.
66. Counsel for the Claimant cited the Respondent's policy on three months notice but did not avail the specific clause in the Respondent's Terms of Service for Academic Staff Grade AC 8-15 November 2009. Pages 3-14 of the document were not availed.
67. The Respondent did not deny having received the letter and responded to it.
68. In the circumstances, the court relied on the documents on record.
69. Since the Respondent cited the law as opposed to the letter of appointment or terms of service, the law requires a one (1) month notice in such contracts and as the Respondent received the letter on July 23, 2013 and responded one month later, but the Claimant received the letter on September 4, 2013, he is entitled to payment of salary up to the date of receipt of the letter by the Respondent on September 4, 2013.
70. The Claimant's letter dated September 4, 2013 details the concatenation of events from July 15, 2013 to September 5, 2013 when the Claimant received a payslip indicating a zero salary.
71. It is the Claimant's case that on August 21, 2013, he wrote to the acting Ag. Vice Chancellor (Academic Affairs) through the Dean, School of Education enquiring about the taking over of his class by one Mr. Wakasiaka yet he was ready to teach. By then he had not received a response to his resignation letter dated July 15, 2013.
72. The Respondent adduced no evidence to controvert the Claimant's evidence on the foregoing allegation.
73. The principles governing undefended suits or where the Respondent fails to tender evidence are well settled. The obligation rests on the Claimant to prove an employment relationship and other allegations to the required standard of proof which is on a balance of probabilities.
74. The provisions of the *Evidence Act* are clear on the burden of proof.
75. Section 107 provides:
 1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.



76. Section 109 provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

77. (See *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR).

78. In this case, the Respondent was obligated to prove that the Claimant did not forward his resignation letter to the Ag. Vice Chancellor or a follow up letter to the Ag. Deputy Vice Chancellor (Academic Affairs) as alleged, that he did not render services or conduct an examination on morning or afternoon of August 30, 2013 or was not given a response on September 4, 2013 or was not appointed as a part-time lecturer and did not teach among other facts. The Respondent did not render any evidence and the submissions by its counsel had no factual foundation to reinforce them.

79. In determining whether the Claimant has proved his case on resignation, rendering of service, administration of examinations and part-time teaching, the court is guided by the documentary evidence on record and the absence of controverting evidence.

80. This approach finds support in *Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi and Another* (2014) eKLR the Court held as follows;

“It is firmly settled procedure that even where a Defendant has not denied the claim by filing a Defence or an Affidavit or even where the Defendant does not appear, formal proof proceedings are conducted. The Claimant lays on the table evidence of the facts contended against the Defendant and the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities does not change even in the absence of a rebuttal by the other side.”

81. The Court of Appeal expressed similar sentiments in *Charterhouse Bank Ltd* (under statutory Management) *V Frank Kamau* (supra) cited by the Respondent.

82. For the foregoing reasons, it is the finding of the court that the Claimant has proved on a balance of probabilities that he forwarded a resignation notice to the Respondent and continued rendering services until he received a response from the Respondent.

83. As regards the prayers sought, the court proceeds as follows;

i. Salary for August 2013

84. Having found that the Claimant continued rendering services up to September 4, 2013, when he received a response from the Respondent, the Claimant is entitled to the salary due to him upto September 4, 2013.

85. Significantly, the Claimant received the salary for July 2013.

ii. 2 months salary notice in lieu of notice

86. Having found that the Claimant failed to establish that he had in fact given a three (3) months' notice to the Respondent, the claim for the 2 months salary in lieu of notice is unsustainable and is disallowed.



iii.Part-time teaching claims

87. The Claimant tendered evidence that he was appointed as a part-time Lecturer in the School of Education to teach two courses 1. EGC 820 – Occupational Counselling 2.PSY 812 – Educational Statistics from May 2013 to August 2013.
88. The letter dated September 25, 2013 was signed by the Ag. Deputy Vice-Chancellor (Administration and Finance). The Claimant signed the letter on October 15, 2013.
89. Relatedly, the Claimant provided a copy of the Declaration of Teaching Workload showing that he taught three (3) courses on full time basis namely; PSY 311, EGC 305 and PSY 410 and two (2) courses on a part-time basis namely; EGC 820 and PSY 812.
90. The Claimant signed the form on September 10, 2013, the Chair of Department, Prof. Ogolla signed the document on September 11, 2013, the Dean of the School, Professor Kadenyi signed the form on September 11, 2013 and the Deputy Principal on September 12, 2013.
91. The form sets out the number of students the Claimant taught in both modules.
92. The letter of appointment to undertake part-time teaching clearly stated the amounts payable for teaching, setting of the examination, invigilation and marking.
93. The Claimant testified that he conducted an examination on August 30, 2013.
94. On the basis of the foregoing, the court is satisfied that the Claimant is entitled to the amount due for the part-time teaching Kshs.240,000/=. The Respondent counsel's argument that the Claimant could not undertake part-time teaching since he was a full-time employee of the Respondent was not supported by any evidence.

iv.Passage and Baggage allowance

95. The Claimant is claiming Kshs.18,000/= as passage and baggage allowance pursuant to Clause 12.3 of the Respondent's Terms of Service which states that "passage and baggage on 1st appointment and on termination of appointment shall be paid at the prevailing Government Rates. The current rate as indicated in schedule XII."
96. Clause 12.2 (x) of the Terms of Service states;

“On first appointment, a member of staff who resigns his appointment before completing 12 months of service shall reimburse the University the cost of passage and baggage incurred on behalf of himself and his family”.
97. Since the Claimant resigned before completing 12 months of service, the court is disinclined to grant the prayer.

v. Honorarium

98. By letter dated November 1, 2012, the Deputy Principal (Academic Affairs) appointed the Claimant as Internal Examiner of a Masters Thesis by one Mary C. Khasiani and a honorarium of Kshs.4,450/= was payable by the University on successful completion of the professional assignment.
99. The Claimant testified that he submitted a report of the exercise on February 14, 2013 and had not been paid by June 2, 2014 as the letter of even date reveals.



100. In the absence of evidence that the Claimant did not complete the assignment as envisaged, the sum of Kshs.4,450/= is awarded.

vi.Pension claims

101. The Respondent is obligated to facilitate the Claimant to access the amount due to him under the Terms and Conditions of the Pension Scheme between the Respondent and the Administrator.

vii. Insurance premium refunds

Co-operative Insurance Kshs.17,855/=

British American Kshs.15,000/=

102. The Claimant testified that the Respondent deducted the amount from his salary but did not remit the same as per the check off system having agreed to do so and offered no explanation. The Claimant is awarded Kshs.32,855/= as insurance premium refund.

103. In conclusion, judgement is entered for the Claimant against the Respondent as follows:

- a. Salary up to September 4, 2013.
- b. Part-time teaching claim for two (2) courses for the May 2013 to August 2013 semester Kshs.240,000/=.
- c. Honorarium of Kshs.4,450/=.
- d. Insurance Premium Refunds Kshs.32,855/=.
- e. Costs of this suit.
- f. Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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