Nyasente v Kenya Methodist University (Cause 736 of 2018)
[2023] KEELRC 831 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 831 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 736 OF 2018

JK GAKERI, J

APRIL 13, 2023

BETWEEN

SAMMY OLIVE NYASENTE ..... CLAIMANT

AND

KENYA METHODIST UNIVERSITY ..... RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on May 18, 2018 alleging that he was not paid for work done in 2015, 2016 and 2017 in accordance with the contract of employment.
2. The Claimant avers that he was employed by the Respondent as a part-time Lecturer in May 2012, teaching Diploma, Degree and Masters Courses at Kshs 1,000/=, Kshs 2,000/= and Kshs 2,500/= per hour respectively and served diligently until January 2015 when the Respondent failed, refused and/or withheld the Claimant's salary for the work done.
3. The Claimant further avers that the sum of Kshs 1,715,000/= was owing for 2015, 2016 and 2017.
4. That on January 25, 2017, the Respondent acknowledged owing the Claimant Kshs 1,335,268/= and promised to pay 20% monthly until payment in full but did not and the amount remained outstanding.
5. The Claimant prays for;
    i. An order directing the Respondent to pay the Claimant Kshs 1,715,000/=.
    ii. General damages.
    iii. Costs of this suit.
    iv. Interest at court rates.
    v. Any other relief this Honourable Court may deem fit to grant.

Respondent's Case

6. The Respondent filed a response to the claim on April 8, 2019 admitting that the Claimant was its part-time lecturer from 2012 and had arranged to settle the dues.

7. It is the Respondent's case that teaching rates varied from semester to semester.

8. That the Claimant failed to key-in attendance and grades and returning attendance sheets and examination sheets to the Chairperson of Department as required under the contract.

9. That from its computation, the amount owed was Kshs 1,065,268/= subject to 30% PAYE and had recorded a consent with the Claimant to settle the sum and had not acknowledged owing the Claimant Kshs 1,335,268/=.

10. The Respondent further avers that the Kshs 270,000/= mentioned in the letter dated 25th January, 2018 was for classes taught in the 1st Semester 2017 and not owing as the Claimant failed to key-in attendance and grades or forward them to the Chairperson of Department.

11. That the Respondent had arranged to pay the Claimant Kshs 1,065,268/=.

12. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's Evidence

13. In his written statement, which he adopted in court, the Claimant stated that in 2017, he withheld student examination results for the amount outstanding of Kshs 1,715,000/=. That by letter dated October 2017, the Respondent acknowledged owing the sum and committed to settle the amount due to the Claimant and drew a cheque dated October 3, 2017 for Kshs 231,529/= but the Respondent was unwilling to commit itself in writing and did not make any payment.

14. On cross-examination, the Claimant confirmed that he was claiming for Kshs 1,715,000/= and general damages, had been paid Kshs 1,065,268/= and Kshs 649,732/= was outstanding.

15. The witness testified that he taught Computer Science to a total of 4 classes under short contracts per semester renewable by signing and payment depended on the level as opposed to the size of the class (number of students).

16. The Claimant testified that he complied with the requirements of paragraph 2 of the contract dated February 11, 2015 regarding keying-in of attendance and grades and returning the attendance and mark sheets and scripts to the Chair of Department but had no documentary evidence to establish that fact.

17. That he filed the claim on May 1, 2018 and had discussions with the Respondent on payment.

18. On re-examination, the Claimant testified that he submitted all records to the University and did not retain copies and the claim covered the duration 2016 and 2017.

19. On the date of hearing on December 8, 2022 after conclusion of the claims case, the Respondent's counsel, Mr. Mwangi informed the court that he had no witness and closed the Respondent's case.

Claimant's submissions

20. According to the Claimant's counsel, the issue for determination was whether the Claimant was entitled to the sum of Kshs 649,732.00.

21. Counsel submitted that the same was due and payable to the Claimant in that inter alia the Respondent admitted owing the Claimant the sum of Kshs 1,715,000.00 by letter dated October 2, 2018.

22. Reliance was made on the decision in *Choitram v Nazari* (1984) KLR 327 to submit that an admission need not necessarily be on the pleadings. It may be in correspondence, documents or oral.

23. Also relied upon to reinforce the submission was the decision in *Equatorial Commercial Bank v Wilfred Nyasim Oroko* (2015) eKLR.

24. Counsel further submitted that if the court held that the sum of Kshs 270,000/= was not owing, then the sum of Kshs 379,732/= was.

25. As regards the action being statute barred, counsel submitted that the same was not specifically pleaded as required by Order 2 Rule 4 of the *Civil Procedure Rules, 2010*.

26. The decision in *Mary Muthoni v Municipal Council of Nakuru* (2007) eKLR was relied upon to underline the fact that Order 2 Rule 4 was couched in mandatory terms.

27. Counsel further submitted that Section 90 of the *Employment Act* limited the duration to 3 years and what was due to the Claimant related to 2016 and 2017 within the 3 years.

Respondent's submissions

28. Counsel identified two issues for determination, namely; whether the claim was time barred and whether the Claimant had proved his case.

29. On the first issue, counsel submitted that the claim was time barred since it was filed on 18th May, 2018 and the Claimant was claiming unpaid salary for January 2015 and the same was rendered by the 2nd limb of Section 90 of the Employment on continuing injury and the suit was commenced 12 months after the services were rendered.

30. As regards prove of the case, counsel submitted that the Claimant had not proved that the Respondent owed him the sum of Kshs 649,732.00 as the Respondent had different rates for the different classes and payment depended on the hours taught. That the Claimant had not demonstrated the classes taught, size, hours and rate of payment and the parameters used by the Respondent to pay the Claimant Kshs 1,065,268/=.

31. Counsel further submitted that the Claimant breached the contracts with the Respondent by withholding examination results and marked scripts and was thus not entitled to payment under the contracts as ordained by the maxim that he who comes to equity must do so with clean hands.

32. The court was urged to dismiss the suit with costs.

Determination

33. The issues for determination are;

    i. Whether the Claimant's suit is statute barred.

    ii. Whether the Claimant has proved his case.

    iii. Whether the Claimant is entitled to the sum of Kshs 649,732/=.

34. As to whether the Claimant's suit is statute barred, parties have adopted opposing positions. According to the Respondent's counsel, the Respondent's non-payment of the Claimant's dues was a continuing injury or damage to the Claimant and he sued after the prescribed duration.

35. Section 90 of the *Employment Act* provides that;

> Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act, or a contract of service in general shall lie or be instituted unless it is commenced within three (3) years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.

36. The meaning of the underlined words was considered in *Mary Kitsao Ngowa & 30 others V Krystalline Ltd* (2015) eKLR where the Court of Appeal stated as follows;

> " According to Black's Law Dictionary, continuing injury is defined as:- "An injury that is still in the process of being committed. An example is the constant smoke or noise in a factory."

This definition connotes an injury that continues to happen at the time the claim is lodged and/or on going. In the context of an employment relationship, it presumes that the parties were still on a continuous engagement at the time of claim. What comes to mind is where for example, the dispute pertains to an industrial strike and one of the parties has moved to court on account of an injury that continues to be suffered during the subsistence of the employment and/or strike.

However, in this case, it is not in dispute that at the time that the claim was lodged, the employment relationship had already been severed. Indeed it is the termination that gave rise to the cause of action. Any claims arising there from could therefore no longer be termed as continuing injury."

37. These sentiments apply on all fours to the facts of the instant case as the employment relationship between the parties had ended by the time the Claimant filed the instant claim.

38. From the documentary evidence on record, the Claimant executed the last contract of service on April 6, 2017 for the 1st Trimester and no other contract appear to have been executed thereafter.

39. Even assuming that the semester took 12 weeks, approximately 3 months, the parties had separated by Mid-July 2017.

40. Relatedly, the Claimant signed many individual contracts that were discontinuous and payment under each of them was distinct and the Respondent's non-payment could not denote a continuing injury.

41. In the court's view, the Claimant had 3 years to enforce the various individual contracts he entered into with the Respondent as ordained by Section 90 of the *Employment Act, 2007*.

42. Regrettably, the Respondent adduced no evidence to clarify its position.

43. For the foregoing reasons, it is the finding of the court that the Claimant's suit is not statute barred.

44. As to whether the Claimant has proved his case, the provisions of the *Evidence Act* are clear on who bears the burden of proof and the standard applicable.

45. Section 107 of the *Evidence Act* provides that;

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.

2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

46. These provisions are further embellished by the provisions of Section 108 and 109 of the Act.

47. In this case, the Claimant bore the burden of proof and as explained by Abuodha J. in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2016) eKLR,

> " This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings which are not backed by any evidence and expect the court to find in his or her favour.

48. The Claimant alleges that he was teaching Computer Science at the Respondent's institution from 2012 and availed documentary evidence of contracts dating 2015 to April 2017. The Respondent on the other hand adduced no evidence to disprove the allegations. Indeed, copies of the Respondent's letter on record reveal that the Respondent was not contesting the entire claim but only part of it.

49. According to the Respondent's letter dated January 25, 2018, the Respondent admitted that it had paid the Claimant the sum of Kshs 1,065,268/= and only Kshs 270,000/= was owing and the Claimant had declined a cheque of Kshs 231,529/=.

50. Similarly, by letter dated October 2, 2017, the Vice-Chancellor of the Respondent appreciated the Claimant's part-time teaching services and acknowledged his claim and pleaded to pay 20% of Kshs 1,715,000/= monthly from November 2017 until payment in full, a promise he did not keep.

51. The letter requested the Claimant to release the scripts he was holding to enable the University release the results to the students. It is unclear as to whether the Claimant honoured the request.

52. Contrary to the Respondent counsel's submission that the Claimant tendered no evidence of the class size, hours taught and rate of payment, copies of the contracts on record contains the information. For instance, under the contract dated April 6, 2017, the Claimant taught HSMU 314, Quantitative Methods for Health, at Kshs 1,500/=, the class had 115 students, 3 credit hours, 45 contact hours and 45 pay hours.

53. The Respondent adduced no evidence to disprove the documentary evidence on record.

54. The court takes judicial notice of the fact that class attendance lists are typically maintained by learning institutions and sometimes by the Lecturer to determine the level of attendance and for purposes of claiming by part-time lecturers and the documents are submitted to the institution when a claim for payment is made.

55. Strangely, the Respondent's list of documents was unequivocal that they were "not available" other than copies of cheque payments. Significantly, the Respondent tendered no direct evidence to controvert the Claimant's claims and its averments are mere allegations unless proved. However, email communication on record would appear to suggest that the Respondent was contesting part of the award, although the Vice-Chancellor's letter to the Claimant dated October 2, 2017 which preceded the email had no such indication.

56. The reason alluded for this is that the Claimant withheld scripts and the students had to take another examination. The Claimant denied knowledge of the fact the students sat another examination. If this was the case, it was a breach of an express contractual term by the Claimant and would in the court's view disentitle the Claimant the amount due for the last month consistent with the terms of the contract.

57. Although the Respondent refused, failed and/or neglected to fulfil its obligation under the contract, keying-in of student attendance and grades and returning the student attendance sheets and examination scripts to the Chair of Department was antecedent to the payment. The Claimant retained the script as a security for payment and secured the Vice-Chancellor's undertaking by letter dated October 2, 2017.

58. It is unclear why the Claimant did not respond to the letter or accept the cheque for Kshs 231,529/= as evidenced by the Respondent's letter dated 25th January, 2018.

59. The court is in agreement with the Respondent counsel's submissions that he who comes to equity must do so with clean hands.

60. In the face of the email communication and absence of further evidence that the Claimant complied with its part of the bargain as obligated by the contract dated 6th April, 2017, the court is unpersuaded that the amount claimed for the 1st Trimester 2017 is the Claimant's entitlement.

61. Be that as it may, the Claimant has evidentially demonstrated that the sum of Kshs 379,732/= was owing.

62. Having found that the Claimant has proved his case, I will now proceed to the reliefs sought.

Sum of Kshs 1,715,000.00

63. Having found that Respondent had already paid the Claimant the sum of Kshs 1,065,268/= by consent, and email communication on record would appear to confirm the Respondent's allegation that the sum of Kshs 270,000/= was not owing due to the Claimant's failure to honour his part of the bargain and having found that his conduct was in the circumstances inequitable, the sum of Kshs 270,000/= is considered as not owing.

    As a consequence, the claimant is awarded Kshs 379,732.00

General damages

64. The Claimant adduced no evidence to establish his entitlement to general damages and how much he was entitled to.

    The prayer is disallowed.

65. In conclusion, judgement is entered for the Claimant against the Respondent for Kshs 379,732.00 with costs.

66. Interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF APRIL 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 March 15, 2020 and subsequent directions of April 21, 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