



Ombega v Kenyatta University (Employment and Labour Relations Cause E010 of 2023) [2023] KEELRC 2585 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2585 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2023
HS WASILWA, J
OCTOBER 24, 2023**

BETWEEN

KEPHA OMBEGA CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

JUDGMENT

Introduction

1. The claimant herein instituted this suit by a memorandum of claim dated January 20, 2023 claiming that the Respondent has withheld his dues and sought for the following reliefs;-
 - a. Payments of unpaid dues amounting to Kshs 1,470,500.
 - b. Payments of costs of this suit and interest.

Claimant's case

2. The claimant states that he employed by the respondent as a part time lecturer earning Kshs 2,300 per contract hour and was tasked to teach several units including; BAC101, BAC406, BAC408, BAC300, BAC407, BAC815 and BAC819 between the year 2018 and 2022. That he taught the said units accumulating his pay to Kshs 1,470,500 as follows;
 - i. BAC 406.....2020-2021.....Semester 2.....Kshs. 80,500
 - ii. BAC 406.....2020-2021.....Semester 1.....Kshs. 80,500
 - iii. BAC 408.....2021-2022.....Semester 2.....Kshs. 80,500
 - iv. BAC 408.....2020-2021.....Semester 2.....Kshs. 80,500



- v. BAC 408.....2020-2021.....Semester 2.....Kshs. 80,500
 - vi. BAC 408.....2018-2019.....Semester 2.....Kshs. 80,500
 - vii. BAC 300.....2019-2020.....Semester 1.....Kshs. 80,500
 - viii. BAC 300.....2021-2022.....Semester 2.....Kshs. 80,500
 - ix. BAC 300.....2020-2021.....Semester 1.....Kshs. 80,500
 - x. BAC 300.....2021-2022.....Semester 1.....Kshs. 80,500
 - xi. BAC 300.....2020-2021.....Semester 1.....Kshs. 80,500
 - xii. BAC 407.....2019-2020.....Semester 2.....Kshs. 80,500
 - xiii. BAC 819.....2018-2019.....Semester 3.....Kshs. 80,500
 - xiv. BAC 819.....2018-2019.....Semester 1.....Kshs. 80,500
 - xv. BAC 815.....2018-2019.....Semester 2.....Kshs. 80,500
 - xvi. BAC 101.....2018-2019.....Semester 3.....Kshs. 80,500
 - xvii. BAC 101.....2018-2019.....Semester 1.....Kshs. 80,500
 - xviii. Transport for each unit @6000 for the 17 weeks Kshs 102,000
- Total claim.....Kshs 1,470,500.00

3. That despite demand and notice to sue being given, the Respondent has refused and or failed to pay the claimant his dues, leading to the filing of this case.
4. During hearing the claimant testified as CW-1 and adopted his statement dated January 20, 2023 and produced the nine documents marked as claimant's exhibit 1-9 respectively. In addition, he stated that on employment he was assigned classes to teach and was never informed whether they met the quorum or not. He stated that he was never informed of the alleged pro-rata payment if the class was not quorate. He maintained that he followed due procedure, in that he taught all the classes he was assigned to, administered examinations, marked and submitted the result and finally send claim forms for payment but the Respondent failed to pay him his dues.
5. Upon cross-examination by Kabuthi Advocate, the claimant stated that he was employed as part-time lecture through an appointment letter by the university. That he used to teach Finance and Management, where department of management paid him his dues save for Unit 101, item (p) and the other finance courses as indicated in the claim. He testified that he is also claiming transport allowance as indicated in the employment letter which he was entitled to Kshs 2,000 per month. He denied repeating some items but upon further cross examination, he admitted that items (e) &(d) are similar. He added that if any items have been repeated the same was erroneously made and the same can be ignored. He also admitted that he has not physically visited the university to follow up on the payments.
6. On re-examination, he stated he was not paid any dues by the Respondent. Furthermore, that there is nothing on record exhibited by the Respondent to demonstrate the alleged payments.

Respondent's case.

7. The Respondent entered appearance on February 28, 2023 through the firm of Lawrence Mungai and Company advocates and filed a response to claim on March 27, 2023. It was admitted in the defence



that the claimant was employed by the Respondent as a part time lecturer to teach its students between the year 2018 and 2022 at the rate of Kshs 2,300 per hour and the maximum hours allowed for part-time teaching was an aggregate of 35 hours.

8. The Respondent stated that the appointment of the claimant as a part time lecture was made under several conditions which were laid out in the appointment letter inter alia that the appointment is provisional subject to the unit attaining the recommended class size.
9. It is the respondent's case that even though the claimant's appointment was at the rate of Kshs 2,300 per hour for a maximum of 35 hours per semester, the claimant was not entitled to a flat rate of Kshs 80,500 per unit regardless of the class size as claimed in the Memorandum of claim but that the university has a policy for payment by pro-rata basis for classes without quorum as provided for under paragraph 2 of the internal memo dated April 15, 2019.
10. Additionally, that a part time lecturer was required to submit exam marks and scripts within the stipulated timeframe then make payment claim attaching evidence of teaching mainly through examination scripts.
11. The respondent states that it has never refused to pay the claimant his dues but that the claimant has failed to follow internal process to provide proof of teaching and claim payments. Thus, the claim herein is premature.
12. It is reiterated that some of the classes taught by the claimant had less than 15 students(quorum), therefore the payments for such classes should be pro-rated and not paid the flat rate of Kshs. 80,500.
13. With regard to paragraph 4 of the claim, the Respondent stated that items (d) and (i) have been repeated in (e) and (k) respectively and therefore the subsequent claim should be removed from the list. Further that the claimant did not teach BAC 300 for 2021-2022 under Item (h) and BAC 101 of 2018-2019 item (p) which should also be removed from the list.
14. The Respondent stated that it has paid the claimant for items number (m), (o) and (q) being BAC 819 of 2018-2019, BAC 815 of 2018-2019 and BAC 1010 of 2018-2019 as evidence in the proof of payment attached to the Respondent's bundle of documents.
15. The Respondent also stated that the following courses had not met the quorum of 15 students;
 - i. Item(a)BAC 406-2020-2021-Semester 2-had 12 student.
 - ii. Item(b)BAC 406-2020-2021-Semester 1-had 8 student.
 - iii. Item (c) BAC 408-2021-2022-Semester 2 had 7 student.
 - iv. Item (d) BAC 408-2020-2021-Semester 2-had 12 students.
 - v. Item (f) BAC 408-2018-2019-Semester 2- had 12 student.
 - vi. Item (g) BAC 300-2019-2020-Semester 1 had 3 student.
 - vii. Item (i)BAC 300-2020-2021-Semester 1 had 3 student.
 - viii. Item (j)BAC 300-2021-2022-Semester 1 had 12 student.
 - ix. Item(l) BAC 407-2019-2020-Semester 2 had 10 students
 - x. Item(n) BAC 819-2018-2019-Semester 1had 3 students.



16. Further that claimant is yet to present evidence of teaching (vii) to (xvi) above in order to get his pro-rated pay as provided for in the employment letter and Also give evidence of teaching item (a),(c), (g), (j) and (l) of his claim .
17. The Respondent stated that this court does not have jurisdiction to hear and determine this case because the claim herein falls within the pecuniary jurisdiction of the Magistrates court. Further that the claimant is not entitled to the reliefs sought and thus the claim should be dismissed with costs.
18. During hearing the respondent summoned the chairman of the department of Accounting and Finance, Dr. Fredrick Warui Waweru, as its RW-1 who adopted his witness statement dated June 7, 2023 and produced the respondent's documents dated June 6, 2023.
19. The witness gave a basis for employment of part time lecture and stated that they are employed in instances where the full-time lecturer is unable to cover the work load. He contends that the university does not have control of the number of students that register for a particular Unit. That before a part time lecture is paid, he is given an application letter that he will indicate the classes taught, exams done and marks posted then take the application letter to the department where he will fill transport allowance form and then ask for payment. He stated that the claimant did not bring such claim both for classwork and transport.
20. Upon cross-examination by Tombe Advocate, the witness testified that he is not based in Nakuru campus, though the claimant was teaching part-time in the Nakuru campus. He reiterated that after a claim is made, attaching all relevant documents payments is effected through the lecture's bank account. He also admitted that the payslip produced is not a confirmation of payment.

Claimant's Submissions.

21. It was submitted for the claimant that it's not in dispute that the claimant was employed by the Respondent between 2018-2022 academic year, as a part time lecturer earning Kshs 2300 per hour. Also that the claimant accumulated unpaid earning totalling to Kshs 1470,500.
22. It was argued that the claimant's claim is supported by seven separate appointment letter each stating the period which he was employed on the part time basis and the pay he was supposed to get. However, that upon presenting the said appointment letter, the Respondent failed to pay leading to the filling of this suit.
23. It was submitted that the claimant demanded for the payment of the said dues vide a demand letter dated October 13, 2022 which the Respondent replied and alleged that the claimant had been paid Kshs 442,750. However, that the allegation was not backed up by any evidence such as EFT transaction advice, bankers' cheque or bank statement. Further that RW-1 did not led any evidence on the allegations that several units were not quorate or the alleged pro-rated payment made. He argued that the payslips alluded to for the months of April & August 2019 and June, 2019 is not conclusive evidence of payment because they are documents that are generated by the Respondent. The Claimant maintained therefore that the sums sought are owing and urged this Court to compel the Respondent to pay.
24. To support these arguments, the claimant relied on the case of *Peterson Guto Ondieki V Kisii University* [2020] eKLR where the court held that; -

“Where the claimant is owed salaries for work done, upon application per the respondent's work place requirements, these pending payments should be processed without undue disadvantage to him. Where the claimant has undertaken his part diligently, applied



the policy, used the payment guide and based on his teaching claims forms duly filled for payment and there is no attendance, nothing stops him from moving the court as appropriate.”

25. Based on the foregoing, the claimant submitted that it has done its part by teaching the students at the respondent university, submitted the appointment letter in pursuit of his pay but that the respondent has refused to pay him. He urged this court, based on the evidence before court, to allow the claim herein with costs.

Respondent’s submissions

26. The respondent submitted on three issues; whether the claimant taught all the units claimed in paragraph 4 of the claim, whether there are any pending payments due for the claimant and whether the claim based on classes with lack of quorum is enough proof that the claimant taught the said classes.
27. On the first issue it was submitted that the claimant has produced only seven (7) appointment letters out of the 17 items claimed in his memorandum of claim. That items number (d) & (i) have been repeated in (e) & (k) therefore items (e) and (k) should be eliminated from the list. Further that RW-1 testified at the claimant did not teach items (h) and (p), which testimony was not rebutted by the claimant therefore the said two items should be eliminated as well.
28. It was submitted that since the claimant has not produced evidence in support of the claim as required under section 107(1) of the *Evidence Act*, he does not deserve the payment of any of the items which is not supported by proof of teaching.
29. On the second issue, it was submitted that the claimant was paid for items number f, m, n, o and p of the statement of claim less statutory deduction adding up to Kshs 442,750 and the Proof of these payment is exhibited by the claimant’s payslips exhibited as document 2 of the Respondent’s documents. Conversely, that if indeed the claimant was not paid, then he ought to have exhibited his bank statement showing that he was not paid by the Respondent.
30. The Respondent submitted on the third issues in the negative and argued that the evidence of teaching was exhibited in appointment letters filled by the claimant, which were paid in full.
31. In conclusion, the Respondent submitted that it has paid the claimant for all the units taught and no claim is outstanding.
32. I have examined all evidence and submissions of the parties herein.
33. The claimants claim is for payment of moneys owed to him for part time teaching of students at the respondents facility where amount totals 1,470,500/=.
34. The respondents admitted that the claimant was a part time lecturer at their facility but despite the computation of the moneys owed the claimant admitted item (e) & (d) were similar and attributed it to a typo error.
35. The respondents averred that the appointment of the claimant was made subject to several conditions which were laid out in the appointment letter inter alia that it was subject to the unit attaining the recommended class size.
36. I have looked at the appointment letters appointing the claimant as a part time lecturer and the appointment was subject to the following conditions;
 - i. “Submission of examination marks and scripts within stipulated timeframe.



- ii. That the class will not be split unless it has exceeded the stipulated class size in the university policy and approval granted by Deputy Vice-Chancellor (academic).
- iii. That this appointment is provisional subject to the unit attaining the recommended class size.

As part-time lecturer, you will be paid at the rate of kshs.2,300/= per contact hour. In any case the aggregates should not exceed 35 hours. The mode of payment will be in four instalments of 25% each payable monthly. The last instalment will be made after submission of marks. You will be expected to mark examination(s) for unit(s) that you have taught and for which you will be paid at the rate of kshs.50/= per script subject to the recommendations of the Chairman and Dean of School.

External part-time lecturers will be re-imbursed travelling expenses subject to a maximum of kshs.2,000/= per month. No other benefits are attached to this appointment”.

37. The respondent’s witness contended that the claimant taught classes which had not attained the recommended ‘class size’. The claimants averred that the claimant did not teach some other units especially BAC 101/2018 – 2019; BAC 300 2021/22.
38. They aver they paid for item (m) (o) & (q) as per their bundle of documents.
39. The documents exhibited by the respondents are however payslips which are not proof of payment per se being documents prepared by the respondents and bearing no signature of the claimant.
40. On issue of the number of students in the class and how payment were to be made, the respondents exhibit 1 which is a memo from the office of DVC Academic, mode for payment depended on the number of students per class whereby for 15 students and above, payment was 100%, for 10 to 14 students – 70%, 5 to 9 students – 50% & below 5 students – 15%.
41. It is therefore apparent that the claimant was not entitled to payment of a flat rate of 80,500/= per unit as exhibited but this depended on the number of students in the class.
42. The claimant failed to submit by evidence the number of students per unit taught which number will determine how his payments were to be calculated.
43. In the circumstances of the case however, I find that in order to avoid a miscarriage of justice, the parties are referred back to negotiating table for calculation of dues owed. I refer parties for conciliation on the issue of the calculation of these figures and submit the same to court.
44. In the alternative, the court will determine the figures as per the evidence on record if parties fail to agree.

DATED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tombe for claimant – present

Kabuthu for Respondent – present

