



**Kiarie & 2 others v Mount Kenya University (Cause E035 of 2021)
[2022] KEELRC 13117 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13117 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E035 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

WANGUI MUNGAI KIARIE 1ST CLAIMANT

MERCY WAMBUI KARUNJUGU 2ND CLAIMANT

BEATRICE CHEROTICH 3RD CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

JUDGMENT

1. This matter was originated by way of a Statement of Claim dated June 28, 2021. It does not disclose an issue in dispute on its face.

The respondent by the respondent's Response to the claimants' joint Statement of Claim dated June 28, 2021 denies the claim and prays that the same be dismissed with costs.

The claimants' in a Reply to Response joins issue with and denies each and every allegation of facts in the respondent's Response to the Claimants' joint Statement of Claim dated September 16, 2021 as though the same was set out herein verbatim and traversed seriatim.

2. The claimants' case is that sometimes in the year 2016 the respondent engaged the 1st claimant as an employee in the position of an Associate faculty in the School of Business and Economics, Department of Management for the Academic year 2016/2017.

The claimants' other case is that the 1st claimant's contract of employment was subsequently renewed by the Respondent on vide contracts dated October 12, 2018 and October 28, 2019 for the academic years 2018/2019 and 2019/2020, respectively. This was the same for the 2nd claimant.

3. The claimants' further avers that the 3rd claimant was engaged by the respondent as an employee in the position of an Associate Faculty in the school of Business and Economics, Department of Accounting



and Finance in the year 2018. This was with a possibility of renewal and this was exercised in her favour save that she was not issued with a written contract despite various follow ups.

The claimants' other case is that part of their job description as Assistants Faculty was to teach students of the respondent for which teaching the claimants were to be paid based on the total number of hours for which each claimant taught. The rates for payments were as follows;

- a. For teaching a PhD Unit Kshs.3,000 per hour
 - b. For teaching a Masters Unit Kshs.2,500 per hour
 - c. For teaching a degree Unit Kshs.1,500 per hour
 - d. For teaching a diploma and certificate Unit Kshs.1,000 per hour
4. In the event of virtual teaching, the standing agreement was a remuneration at Kshs.25,000 per unit.

The claimants' aver that in the academic years 2018/2019 and 2019/2020 their total claim for hours taught amounted to Kshs.1,247,000.00.

Other claims includes;

1st claimant- Kshs.360,000.00 for holiday sessions

2nd claimant – Kshs.352,000.00

2nd claimant –Kshs.442,000.00 for distance institution-based electronic learning programmes units.

3rd claimant-Kshs.660,000.00 for teaching in the academic years 2018/2019

5. The claimants' penultimate case is that in December 2019 the Respondent summarily dismissed them without notice of intention so to do or writing. She did not pay the salary arrears owed and they resorted to the Kenya Private Universities Workers Union who recorded a dispute at the Thika Labour Office. Here, conciliation was had and a determination made in their favour but the minutes and report of the conciliator have not been availed to date.

This amounts to a violation of the claimants' rights and breach of fair labour practices in contravention of article 41 of the Constitution of Kenya, 2010.

They pray as follows;

- a. The 1st Claimant
 - i. Kshs.1,607,000 being the amount unpaid by the Respondent to the 1st claimant on account salary arrears.
 - ii. General damages for the Respondent's infringement of the 1st Claimant's right to fair labour practices.
 - iii. Cost of this claim.
 - iv. Interest on a (i) to a(iii) (above inclusive) at court rates
 - v. A certificate of service; and
 - vi. Any other order or remedy that this Honourable court may deem just to grant.
- b. The 2nd claimant



- i. Kshs.442,000 being the amount unpaid by the Respondent to the 2nd claimant on account salary arrears
 - ii. General damages for the Respondent's infringement of the 2nd Claimant's right to fair labour practices.
 - iii. Cost of this claim.
 - iv. Interest on b (i) to a(iii) (above inclusive) at court rates
 - v. A certificate of service; and
 - vi. Any other order or remedy that this Honourable court may deem just to grant.
- c. The 3rd claimant
- i. Kshs.660,000 being the amount unpaid by the Respondent to the 3rd claimant on account salary arrears
 - ii. General damages for the Respondent's infringement of the 3rd Claimant's right to fair labour practices.
 - iii. Cost of this claim.
 - iv. Interest on c (i) to a(iii) (above inclusive) at court rates
 - v. A certificate of service; and
 - vi. Any other order or remedy that this Honourable court may deem just to grant.

6. The respondent's case is an admission that it engaged the 1st claimant as an Associate Faculty in the academic years 2018/2019 and 2019/2020 but would wish to clarify that the said contracts were separate and independent, each running for a maximum period of twelve (12) months and as such they were not subject to the renewal or extension of any previous or existing contract as alleged by the claimants or at all. Paragraph 3 of the statement of claim is therefore denied *in toto* and the claimant is put to strict proof thereof.

The respondent's further avers that the claimant's appointment as an Associate Faculty pursuant to the letter of appointment dated October 12, 2018 was for a contractual period of one year, being the academic year 2018/2019 and which appointment expired on the October 12, 2019 upon the end of the contractual period. Indeed upon the expiry of the 2018/2019 contract, the claimant was again given another one year contract for the academic year 2019/2020 pursuant to the letter of appointment dated October 28, 2019 and which contract expired upon the end of the said contractual period.

The Respondent's other case comes out thus;

The 2018/2019 and 2019/2020 contracts were separate and distinct one year contracts for the 1st claimant.

The 2nd claimant was also similarly appointed on October 28, 2019 for academic year 2019/2020 and vide a letter of even dates.

Her terms of employment are contained in the said letter.

The 3rd claimant was also similarly appointed vide a letter dated October 12, 2018 on terms therein stipulated.

All the terms of employment for each of the claimant were captured in the individual letters of appointment.



The 1st claimant was paid for all the units she taught in the academic year 2018/2019 and 2019/2020 as per her letter of appointment all totalling Kshs.105,700.00.

The 1st claimant was not engaged in any institution based electronic learning and her allegations and case to the extent is denied in toto.

The 1st claimant is not owed a farthing.

This is the same for the 2nd claimant who was paid a total of Kshs.69,300.00 and is also not owed, or at all.

No distance institution based electronic learning programme units were located to the 2nd claimant during the holidays in April, 2018 and August, 2019.

The 3rd claimant is also not owed as alleged/claimed, or at all.

7. The respondent in the penultimate avers that there was indeed no termination of employment of the claimants' but a mere expiry of their fixed term contracts at the lapse of the agreed period inter partes.

The respondent in conclusion avers that the parties were engaged in personalised conciliation talks without involvement of the union as alleged. This talks collapsed after failure by the claimant to proof and justify their claims against the Respondent whereupon they chose to abandon this process and pursue the claim in court. Inasmuch the claimants remain paid for all the outstanding bills and are not owed whatsoever.

8. Their individual certificates of service are available for collection and this is communicated and known to the claimants.

The matter came to court variously until the September 21, 2022 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of employment of the claimants by the respondent.
2. Whether the termination of employment of the claimants by the respondent, if at all, was wrongful, unfair and unlawful.
3. Whether the claimants are entitled to the relief sought.
4. Who bears the costs of this cause.
9. The 1st issue for determination is whether there was a termination of employment of the claimants by the Respondent. The claimants did not furnish any written submissions in support of their case.

The Respondent's however came up with their written submissions dated September 19, 2022 where they chose to analyse the evidence and law involved in this case on the following two headings;

- i. Whether the claimants are entitled to the remedies sought in the statement of claim dated June 28, 2021.
 - ii. Whether the Respondent has violated the claimants' right to fair labour practices.
10. In this, the respondent reiterate the case and submits that she indeed has not violated the claimants' rights but instead run a fixed term contract to its terms. There is therefore no termination of employment as alleged in the claim.



The claimants' have not adduced any evidence in support of their case for unlawful termination of employment as alleged and pleaded. They fall short of satiating the requirements of the provisions of section 47 (5) of the Employment Act, 2007 which comes out as follows;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

11. The claimants' have not established their case so as to move the respondent to demonstrate and justify lawful termination of employment. Without controverting the respondent's case on no termination of employment, their case is lost. I therefore find that there was no termination of employment of the claimant by the Respondent and hold as such.

The 2nd issue for determination is whether the termination of employment of the claimants by the respondent, if at all, was wrongful, unfair and unlawful. It is our finding that no termination of employment occurred in the circumstances. This issue for determination therefore dissipates into nothingness.

12. The 3rd issue for determination is whether the claimants are entitled to the relief sought. They are not. Having failed on a case of termination or any owings by the respondent, they become disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears the costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Miss Mwangi instructed by Magdalene M. & Company Advocates for the Claimants.

Mr.Omondi instructed by Adera & Kenyatta Advocates for the Respondent

