



REPUBLIC OF KENYA



**Ochwajilo & another v Onyango & 3 others (Cause E004 of 2021)
[2022] KEELRC 13277 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13277 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E004 OF 2021
JW KELI, J
NOVEMBER 24, 2022**

BETWEEN

CHRISPINUS MASAYI OCHWAJILO 1ST CLAIMANT

CHRISPINUS MASAYI OCHWAJILO 2ND CLAIMANT

AND

ISAAC ONYANGO 1ST DEFENDANT

ISAAC ONYANGO 2ND DEFENDANT

AND TECHNOLOGY (VIST) 3RD DEFENDANT

VICTORIA INSTITUTE OF SCIENCE AND TECHNOLOGY

(VIST) 4TH DEFENDANT

JUDGMENT

Issue: Unpaid Wages

1. The claimant through Gabriel Fwaya advocate filed a plaint dated against the respondent dated February 28, 2014 seeking the following reliefs:-
 - a. Kshs 433,000/-
 - b. Costs
 - c. interest on (a) and (b) above.
2. Together with the claim, the claimant filed his verifying affidavit, his witness statement, list of documents of even date together with the bundle of documents.
3. The defendants entered appearance through the law firm of Matete Mwelese & Co Advocates and filed statement of defence dated April 9, 2014.



4. The matter was fixed for hearing on the September 21, 2022. The defendants were absent. There was return of service of hearing notice served on the law firm of Matete Mwelese & Co Advocates. The law firm had indicated receipt under protest. On perusal of the court file (case filed in 2017 the court noted history of receipt of service under protest by the respondent's advocates who were always absent despite service. The principle of law of justice delayed is justice denied could never have been so relevant. See article 159(2)(b) of the Constitution of Kenya, 2010 to wit:- "the court is to be guided by the principle that justice shall not be delayed". The court proceeded with the hearing of the claimant's case where he testified as witness of fact and relied on his filed plaint and witness statement and documents filed under list of documents dated February 28, 2014.
5. After the hearing, the claimant asked the court to render its judgment.

Claimant's Case in Summary

6. The claimant's case as per his evidence in chief was that he was employed by the defendants on the January 7, 2013 (exhibit 1) as Deputy Principal Administration and Marketing at a salary of Kshs 30,000/- per month under contract of 2 years. That the employer further appointed him as a part-time lecturer at hourly rate of Kshs 700 for diploma course and Kshs 600 for certificate course. (exhibit 2). That he accepted both appointments starting as a deputy principal on January 7, 2013 and part-time lecturer on the January 15, 2013. That on April 15, 2013 he was appointed as part-time lecturer during holiday sessions hourly rate of Kshs 700 for diploma course and Kshs 600 for certificate course. That he worked upto December 15, 2013. That he had salary arrears and when he went to the director's office to claim the salary arrears he was chased out and told not to return. That he was paid first month of January and in February Kshs 15,000/- and was not paid in the month of March to December. He claims total salary arrears of Kshs 315,000/-.
7. On the part-time lecturer claim. The claimant told the court that that he was only paid Kshs 6000/- and was not paid for Kshs 58,000/- for hours worked.
8. The claimant sought notice pay for 2 months salary total Kshs 60,000/- The claimant told the court that under the statement of defence the employer was willing to settle but no payment to date.
9. The defendants in their statement of defence admitted salary arrears but stated they had paid Kshs 60,000/- and were willing to settle. They did not file any supporting document. The defence having failed to attend court for hearing to produce their evidence the claim stood undefended.

Determination

10. The parties did not identify the issues for determination. The court considered the reliefs sought under the plaint and was of the opinion that the issue for determination in the dispute is whether the claimant is entitled to reliefs sought.
11. The reliefs sought are of salary arrears total Kshs 315,000/-, part-time lecturer payment of Kshs 58,000/- and two months' notice pay for the sum of Kshs 60,000/- making total sum of Kshs 433,000/-
12. The burden of proof lies with the one who alleges as stated under the Evidence Act as follows:-

"107. (1) Whoever desires any court to give judgment 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. 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."



13. Applying the provisions of section 108 of the *Evidence Act* the court found that the claimant had established he was an employee of the 2nd defendant effective February 15, 2013 (exhibit 1). The said letter stated that he was offered employment as a deputy principal administration and marketing for a period of 2 years with effect from February 15, 2013 at gross salary of Kshs 30,000/-. The claimant accepted the offer of employment on the February 22, 2013.
14. The court further found that the claimant was offered an appointment as part-time lecturer to teach during January to April semester at 700/- hour per unit for diploma course and Kshs 600/- per hour per unit for certificate course (exhibit 2)
15. The court found the claimant was again offered appointment to teach part-time lecturer during the April holiday session of 2013 at 700/- hour per unit for diploma course and Kshs 600/- per hour per unit for certificate course (exhibit 3).
16. The claimant produced part-time lecturer's payment claim form for diploma in education dated May 10, 2013 for claim of the sum of Kshs 14,750/- for 21 hours.
17. Applying the provisions of section 107 of the *Evidence Act* which reads:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The court finds and determines as follows:-

18. The claimant's employment as Deputy Principal was effective from February 15, 2013. The claimant in oral testimony told the court that he was paid Kshs 15,000/- in February 2013 which is half of his month salary. The court finds no salary arrears due for the month of February 2013.
19. The court finds that the claim of salary arrears was not rebutted. The claimant discharged his burden of alleging the arrears. The claimant in oral testimony told the court he worked upto December 15, 2013. Section 18 (2)(c) of the *Employment Act* provides that wages are due in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof. The court finds that the claimant was thus entitled to unpaid salary arrears for worked months being March to November and half salary in December 2013 on termination of services thus Kshs 30,000 x(9 months) + Kshs 15,000(15 days of December) total due salary in arrears as Deputy Principal awarded at Kshs 285, 000/=
20. On the salary arrears for part-time teaching claims. The claimant produced part-time lecturer's payment claim form for Diploma in education dated May 10, 2013 for total Kshs 14,750 for 21 (exhibit 4). Section 108 of the *Evidence Act* states :

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

The claimant found himself in this situation. He only proved 21 hours taught for diploma of which he claimed from employer for the sum of Kshs 14,750/-(Exhibit 4). The claimant is awarded Kshs 14,750/- as arrears for part-time teaching.

Notice Pay

21. The claimant sought to be paid two months salary notice pay. The defence stated he deserted employment. The defence evidence was not produced in court hence remained on record as mere



papers. The employment letter (exhibit 1) did not provide for notice. The provisions of the Employment Act on notice pay come to play to wit;

‘Section 35. Termination notice (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.’

22. Section 36 of the Employment Act provides for payment in lieu of notice. The claimant was engaged monthly. Notice Pay in lieu of one month is awarded as Kshs 30,000/- under section 35(1)(c) and 36 of the Employment Act the employment contract being silent on notice.
23. Costs: The costs of the suit are awarded to the claimant against the 2nd respondent.
24. Interest :- interest is awarded at court rates from date of filing suit being a claim of unpaid salary which the defendant in their statement of defence admitted was not paid to payment in full.

Conclusion And Disposition

25. The court enters judgment for the claimant against the 2nd respondent (the employer) as follows:-
 - a. Award of salary arrears as a deputy principal for the total sum of Kshs 285,000/=.
 - b. Wages for part time teaching for Kshs 14,750/- .
 - c. Notice pay of one month salary awarded for the sum of Kshs 30,000/- . (above awards a,b and c total sum of Kshs 329,750/- payable subject to statutory deduction).
 - d. The claimant is awarded costs of the suit payable by the 2nd defendant.
 - e. Interest awarded at court rates from date of filing suit until payment in full.
26. Stay of 30 days.
27. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 24TH NOVEMBER 2022.

JW KELI.

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant :- Were holding brief for Fwaya Advocate

Respondent: Absent

In chambers - Exparte Court order.

Judgment amended on error of Case Number.

It is so ordered.

JW KELI,

JUDGE.



1.12.2022

