



**Achieng v Great Lakes University of Kisumu (Cause E035 of 2021)
[2022] KEELRC 13535 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13535 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E035 OF 2021
CN BAARI, J
DECEMBER 15, 2022**

BETWEEN

DOROTHY ACHIENG CLAIMANT

AND

GREAT LAKES UNIVERSITY OF KISUMU RESPONDENT

JUDGMENT

1. The claimant in a Memorandum of Claim dated April 9, 2021, and filed in court on April 12, 2021, seeks an award for payment Kenyan Shillings Seven Hundred and Seventy-Eight Thousand Three Hundred and Five (Kshs.778,305.00) in salary arrears for the months of April, May, June, July, August, September, October and November, 2020.
2. The respondents filed a Response to the claimant's claim dated July 29, 2021, through the Firm of Owiti, Otieno & Ragot Advocates, wholly denying the Claimants' claim.
3. The matter was heard on March 8, 2022, when the claimant testified in support of her case. She adopted her witness statement dated February 9, 2021, and produced the list and bundle of documents filed in the suit as exhibits in her case.
4. The respondents' case was heard on June 29, 2022. The respondents presented one Ms. MaryAnne Atieno, their Human Resource Officer to testify on their behalf. Ms. Atieno adopted her witness statement and produced documents filed in support of the respondents' case.
5. Submissions were filed for both parties.

The Claimant's Case

6. The claimant's case is that she was employed on December 1, 2019, by the respondents as a University Librarian, and assigned an employment No. PF No. 1631.



7. It is her case that she lawfully, faithfully and diligently executed her duties as an employee of the respondents and in accordance with her employment contract. It is her further case that on December 13, 2019, her salary was reviewed upwards, and was issued with a letter indicating a harmonization of salary dated 1December 3, 2019.
8. The claimant states that her employment with the respondents ended on November 30, 2020, when her employment contract expired.
9. The Claimant further states that despite diligently working and performing her duties according to her employment agreement, the respondents have failed to pay her monthly salaries, even after writing a letter to them demanding payment of the salary arrears.
10. The claimant contends that her claim against the respondents is for unpaid salaries amounting to KSHS.778,305.00, for the months of April, May, June, July, August, September, October and November, 2020.

The Respondents' Case

11. The respondents' case is that they did not employ the claimant and have no records in relation to the claimant's employment.
12. It is the respondents' case that if the claimant was employed by them, then the employment was irregularly done since it was made by a person (the former Vice Chancellor) who was under suspension and who was expected to have vacated office but did not, and continued instead, to run the affairs and transact the business of the university including recruitment of employees. The respondents further state that the claimant's salary increment letter is also irregular for similar reason.
13. The respondents state that the claimant was aware that the person who employed and promoted her was unauthorized to do so. It is the respondents' assertion that the appointment and salary harmonization letters are fraudulent for reasons that there were procedural anomalies in their issuance.
14. The respondents state that the claimant never submitted her performance appraisal, and that there was no report or justification from the supervisor to warrant promotion and/or salary increment. It is the respondents' further case that the claimant's allegation that her salary was increased even before she completed her probation period, only compounds the fraud.

The Claimant's Submissions

15. It is submitted that the claimant was duly employed by the respondents on a fixed term contract from December 1, 2019, to November 30, 2020, as University Librarian.
16. It is further submitted for the claimant that from the respondents' documents, the former Vice Chancellor, Prof Atieno Amadi was dismissed in March 2017, and therefore, there is no way that the claimant was employed under the tenure of the former Vice Chancellor, Prof Atieno Amadi.
17. The claimant submits that the salary harmonization was effected by the respondents' Human Resource Manager on behalf of the University, and not by the former Vice Chancellor. The claimant further submits that by the time of the harmonization of the claimant's salary on December 13, 2019, the Vice Chancellor had already been dismissed in March, 2017, the claimant placed reliance in [*George Okoth Owour V Parliamentary Service Commission & 2 others* \[2014\] eKLR](#).



The Respondents' Submissions

18. The respondents submit that the claimant's letter of appointment was signed by a Mr. Rono, whom she purports was the Human Resource Manager of the respondent, but who actually was a librarian at the University, and which act raises a concern as to how a librarian signed an appointment letter.
19. It is the respondents' submission that the claimant failed to produce any other proof to show that she was an employee of the respondents, and that she was being remunerated by the respondents for the months which she is not claiming non-payment of salaries.
20. The respondents further submit that the claimant admitted that her name was missing in the list of employees maintained by the respondents at the time she alleges that she was employed by them.
21. The respondents submit that the claimant's admission that she did not possess the institution's Identification Card and was never issued with one the entire period she worked for the respondent, is prove that she never was their employee. The respondents sought to rely in *Isuzu East Africa Limited (Formerly General Motors East Africa Limited) v Joseph Likoe Nyangweso* [2020] eKLR for the proposition that the burden of proof remains with the alleging party until it is shifted by sufficient evidence that supports the existence of the alleged fact or set of facts.
22. It is the respondents' submission that being the purported employer, they maintain the position that they never employed the claimant and therefore does not possess any documentation showing that it has ever remunerated the claimant, and thus the burden of proof subsequently shifts to the claimant to prove the contrary.

Analysis and Determination

23. Having considered the pleadings, the witnesses' oral testimonies and the parties' submissions, the issues for determination are:
 - i. Whether the claimant was an employee of the respondents
 - ii. Whether the claimant is deserving of the reliefs sought.

Whether the Claimant was an employee of the Respondents

24. Whether one is an employee of a company or not, is dependent on there being a valid employment contract, be it written or oral.
25. The claimant's case is that she was employed by the respondents on a one-year fixed term fixed term contract, commencing in November, 2019, and lapsing in November, 2020. It is her further case that the respondents owe her on account of unpaid salaries for the months of April, May, June, July, August, September, October and November, 2020.
26. The respondents' on their part contend that they did not employ the claimant, and that if she was ever employed, the appointment was irregular, premised on the reason that the Vice Chancellor then in office, was there illegally, having been suspended and subsequently dismissed from the service of the respondents.
27. The claimant's employment having been contested, shifts the burden to her to prove that she was an employee of the respondents. The claimant produced in evidence an appointment letter and a letter communicating a salary adjustment/increment.



28. For starters, the two letters produced in evidence were said to have been executed by a person who purported to hold the position of Human Resource Officer, but whom the respondents told the court was in fact the university librarian. This casts doubt on the credibility of the letters.

29. In *Isuzu East Africa Limited (Formerly General Motors East Africa Limited) v Joseph Likoe Nyangweso* [2020] eKLR. The court stated thus:-

“I have carefully considered the pleadings, evidence and submissions on the question of the employment relationship between the parties herein. It is trite law that he who alleges the existence of a fact must prove.....

The question that arises is whether or not during the trial of the suit the respondent adduced sufficient evidence to prove on a balance of probability that he was employed by the appellant under a contract of service on the fateful day. The appellant was categorical in her pleadings and the testimony of the DW1 that the respondent was never her employee and she did not owe him any duty of care.

The respondent never produced any written evidence of employment or called any witness to confirm that he was indeed employed by the appellant on the fateful day. I therefore find that the respondent failed to discharge his burden of proving employment relationship between him and the appellant and proceed to return that the trial court erred both in law and fact in finding that the respondent was employee of the appellant on the fateful day. I further find that the trial court erred in law and fact by shifting the burden of proof when she found that the appellant had failed to prove by employment record that the respondent was not her employee on the fateful day. In my view the default to produce the employment record did not make the respondent an employee of the appellant.”

30. That the claimant was appointed to the position of university librarian by a fellow librarian, further points to possible collusion and especially in an institution that was facing management wrangles.

31. As correctly submitted by the respondents, I would have expected the claimant to produce documents such as pay slips and bank statements for the period she was allegedly paid salary, as prove that she indeed was an employee of the respondents. In *Herman Ilangarwa Shidakwa v Armati Security Solutions Limited* [2019] eKLR the court held that the claimant had proved an employment relationship on the basis of bank statements showing receipt of salary from the respondent.

32. Further, the respondents produced in evidence a register of their employees for the year 2019 to 2020, and the claimant’s name is not on the register. The claimant admitted on cross-examination not being on the staff register for the period of her claim, and could not explain the absence of her name nor did she contest the accuracy of the register. In *Monica Kanini Mutua v Al-Arafat Shopping Centre & another* [2018] eKLR the court stated:

“.....The claimant must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”

33. The claimant could also not explain to the court why she did not have a staff identity card even after admitting that it is one of the documents that the respondents issues to employees upon appointment.

34. It is my considered view, that the claimant has not sufficiently proved that she was an employee of the respondents, validly and procedurally employed.



35. I find and hold that the claimant was not an employee of the respondents.

Whether the Claimant is entitled to the reliefs sought.

36. The claimant's claim is for payment of unpaid salary for the months of April, May, June, July, August, September, October and November, 2020.

37. Having made a finding that the claimant was not an employee of the respondents, renders the claims for unpaid salaries moot.

38. The claimant's claim is accordingly dismissed in its entirety with no order as to costs.

39. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 15TH DAY OF DECEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Ms. Anuro h/b for Ms. Oduor for the Respondent

Ms. Christine Omollo- C/A

