



**Kunga v Catholic University of Eastern Africa (Cause 40 of 2020)  
[2022] KEELRC 13418 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13418 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 40 OF 2020  
S RADIDO, J  
DECEMBER 7, 2022**

**BETWEEN**

**ANDREW ONYANGO KUNGA ..... CLAIMANT**

**AND**

**CATHOLIC UNIVERSITY OF EASTERN AFRICA ..... RESPONDENT**

**JUDGMENT**

1. Andrew Onyango Kunga (the claimant) was employed by the Catholic University of Eastern Africa (the respondent) as a part-time lecturer in 2017.
2. On 22 June 2020, the claimant sued the respondent, alleging breach of contract (failure to pay remuneration).
3. The respondent filed a response on 7 July 2020, and the cause was heard on 4 October 2022.
4. The claimant and a human resources manager with the respondent testified.
5. The claimant filed his submissions on 25 October 2022 and the respondent on 23 November 2022.
6. The claimant identified the issues for determination in the submissions as:
  - i. Whether the termination of the claimant's employment was unfair?
  - ii. Whether part of the claimant's claim, amounting to Kshs 341,000/- is time-barred?
  - iii. Whether the claimant's oversight in filing his demand letter duly served upon the respondent can be rectified?
  - iv. What remedies ought to be granted to the claimant.
7. The respondent, on its part, set the issues for adjudication as:



- i. Whether the claimant was employed by the respondent, and if so, when was the effective date of employment?
  - ii. Whether the claimant performed his part of the contract of employment and the respondent paid his wages?
  - iii. Whether the claimant is entitled to the prayers sought in the statement of claim?
  - iv. Who should bear the costs of this suit?
8. The court has considered the pleadings, evidence, and submissions.

### **Employment Relationship**

9. Both the claimant and respondent produced a copy of the contract dated 5 October 2017 they signed, indicating that the relationship commenced on that day.

### **Limitation**

10. The claimant produced a handwritten schedule of claims for the period 2012 – 2016 to support his claim for salary arrears of Kshs 341,000/-.
11. The respondent objected to this head of the claim on the ground that it was statute-time barred having been brought after the 3 years prescribed by section 90 of the *Employment Act*, 2007.
12. The claimant sued the respondent on 22 June 2020, more than 3 years after the period this particular head of the claim relates to.
13. The court, therefore, agrees with the objection by the respondent that this particular head of the claim had become stale by the time the claimant moved the court.

### **Unfair Termination of Employment/Constructive Dismissal**

14. The claimant pleaded in paragraphs 7, 8 and 9 a case for constructive dismissal.
15. However, the claimant, despite being represented by an advocate, did not seek any prayer with respect to this cause of action.
16. The claimant did not amend the pleadings to reflect a prayer for constructive dismissal.
17. The claimant did not lead any evidence to show that he resigned because of an intolerable work environment or fundamental breach of a term of the contract on the part of the respondent.
18. The court, in the circumstances, declines to examine or address this head of the claim.

### **Breach of Contract**

19. Under section 18 of the *Employment Act*, 2007, an employer is required to pay wages when they fall due. The contract between the parties provided for payment of salaries upon completion of tasks and generally within one month of submission of moderated results.
20. Under section 20 of the *Employment Act*, 2007, the employer is obligated to keep pay records and also issue an employee with an itemised pay statement.



21. The respondent contended that all salaries owing to the claimant were paid. It also asserted that upon the request of the claimant, it paid school fees for the son in the sum of Kshs 194,235/-. The claimant admitted that the respondent paid the fees.
22. The claimant did not outline in the body of the statement of claim the period for which he was asserting he was not paid. The particulars were also not included in the filed witness statement which was adopted as part of the evidence.
23. However, to demonstrate that he fulfilled his part of the contract, the claimant produced in court copies of class attendance sheets for May-August 2017 for course codes CFI 312, CMH 324, June 2017 for course code CFI 311, CFI 421, CFI 321, CFI 411, CFI 312, CFI 324 and class attendance sheets for September – November 2017, September – November 2017 trimester, course codes CFI 423, CFI 321, final teaching timetables for May – July 2017, claim forms for May 2017 (same forms for other periods were produced).
24. The forms did not have signatures from the respondent’s relevant authorising officers. The claimant explained the lack of signatures on the fact that he would fill his part of the forms and present the same to the respondent’s officers for approval and that once approved, the forms would not be given to him.
25. The respondent did not displace the explanation or suggest that it was not probable.
26. The respondent, as the employer did not place any records before the court that it paid the claimant salaries during the contract term.
27. The claimant, as an employee, could not be expected to prove a negative, that is, that he was not paid. Any employee cannot be expected to prove non-payment of remuneration through documentation.
28. The court will, consequently find for the claimant save for the amounts discounted because of the law of limitation and amount admitted as having been paid as school fees.

### **Conclusion and Orders**

29. The court finds and declares that the respondent was in breach of contract by not paying the claimant salaries when the same fell due.
30. The court enters judgment for the claimant in the sum of Kshs 756,763/- together with interest from 22 June 2020.
31. The claimant did not send a demand before action. Each party to bear own costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 7<sup>TH</sup> DAY OF DECEMBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Claimant Lugano & Lugano Advocates

For Respondent KW EW Advocates LLP

Court Assistant Chrispo Aura

