



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 755 OF 2018

SIMON NDICU.....CLAIMANT

-VERSUS-

KARATINA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant's suit is contained in the amended Statement of Claim dated 27.1.2020 in which he alleged that he was employed by the Respondent as a part-time lecturer for three (3) years starting September 2015. He averred that his wages included Kshs. 1700 per hour, Kshs. 1000 for examination setting and Kshs. 50 per script of exam marked. He further averred that between September 2016 and February 2018, the Respondent delayed payments to part time lecturers including himself. He therefore prayed for the sum of Kshs. 611,10 as outstanding wages not paid. He also prayed for costs of the suit plus interest.

2. The Respondent admitted that she employed the Claimant as part-time lecturer but blamed him for not indicating or demonstrating when he attended his classes so as to enable it assess his payment. It further contended that the gross remuneration payable for each cause is Kshs. 54600 for maximum 15 weeks which translates to Kshs. 1,213 per hour subject to tax deductions. It denied any breach of the Constitution or international law and urged the court to dismiss the suit because it is premature, ill conceived and an abuse of the process of the court.

3. The suit proceeded by written submissions on the basis of the documentary evidence on record.

CLAIMANT'S CASE

4. The Claimant filed a written testimony dated 21.5.2018 in which he stated that he was employed to teach as external lecturer in the School of Business, Department of Economics during September-December 2015, September-December 2016, January- April 2017, September – December 2017 and in January- April 2018 semesters. His wages were Kshs. 1700 per hours, Kshs. 1000 for exam setting and Kshs. 50 per exam script marked. He was supposed to receive his payment after teaching and marking exams. His wages for 2015/2016 were paid in May 2017 and he was not issued with any appointment letter until May 2016.

5. In February, 2018 the Respondent was issued with appointment letters for the semesters running from September 2016 to April 2017 with a consolidated figure for the entire semester. The said consolidated pay was a review of his terms of service which were made without his consent and after rendering the services. He contended that the reduction of payment rates offends the Constitution of Kenya, the ILO Convention No. 158 and the Employment Act 2007.

6. He tabulated the arrears of the wages due for 12 months taught in (4) semesters running from September 2016 to April 2018 totalling to Kshs. 611,100 and prayed for judgment for the sum due plus costs and interest.

7. He relied on section 10(5) of the Employment Act which bars an employer from changing terms of employment contract without prior consultation with the employee. He further relied on **Peter Wanyama Ojiambo v Technical University of Kenya & 2 Others [2020]eKLR** where Onyango J held that reducing salary of an employee without any prior discussion and agreement was unconstitutional.

DEFENCE CASE

8. The Respondent relied on the written testimony by its Registrar, Planning and Administration who stated that the current rate for remunerating part-time lecturers was approved by the University Council on 3.2.2017 and communicated through school Boards and Departmental Meetings. He contended that part-time contracts are separate and independent from one another and as such the remuneration rate is not constant.

9. He contended that the policy change to payment of Kshs. 54600 from part-time lecturers at Bachelors level was made upon benchmarking with other universities, and also upon consideration of factors like reduced funding and reduced students population. He concluded by stating that the said rates were comparable with the remuneration from universities.

10. The Respondent produced an internal memo dated 4.2.2020 by which its Registrar, Dr. Wangari Gathuthi forwarded the calculation of the Claimant's dues for five (5) semesters between September 2015 and April 2018.

11. He submitted that the Claimant was engaged under fixed term contracts and as such there was no obligation to consult him before changing the terms of the subsequent contract including changing the remuneration to Kshs. 54,600. For emphasis it relied on **Amatsi Water Service Company Ltd –vs- Francis Shire Chachij[2018]eKLR**.

12. The Respondent further submitted that the doctrine of legitimate expectation does not apply in this case because it had issued the Claimant with the appointment letter dated 23.2.2016 after prior communication of the change of policy through Departmental and School Boards which are headed by a Dean. It contended that for the doctrine to apply the Claimant must show that he relied on some explicit or implied representations made by it to the effect that future part-time engagements would continue on the same terms.

13. Further, the Respondent submitted that the Claimant is required to submit the relevant documents as proof that he taught during the said period. It submitted that the failure by the Claimant to present the proof that he taught as a basis for payment is circumventing administrative requirements which is key to enhancing accountability of resources.

14. Finally, the Respondent distinguished this case from **Peter Wanyama Ojiambo case supra**, because in the latter case the remuneration dispute involved the period after the employee had been confirmed to permanent employment.

ISSUES FOR DETERMINATION

15. Having considered the pleadings, evidence and submissions it is common ground that the Claimant was engaged as a part-time lecturer whereby he was being paid Kshs. 1700 per hour, Kshs. 1000 for setting exam and Kshs. 50 per exam script marked. There is further no dispute that the Respondent changed payment policy to a gross rate of Kshs. 54600 per unit per semester. The issues for determination are:

(a) Whether the said change of the policy was unfair and unlawful.

(b) Whether Claimant is entitled to remuneration sought.

CHANGE OF POLICY

16. The Respondent contended that it varied its payment policy for part-time of lecturers after benchmarking with other universities and upon considering the prevailing circumstances including low funding and low student enrolment. The said decision by the Respondent's Council is a managerial prerogative which is not within the court's powers to interfere, if done in a way that does not violate accrued rights of employees. Such violation would occur for example when the changes in the payment rates are applied retrospectively. Whereas it is the norm that addition of employment benefits can apply retrospectively, reduction therefore cannot apply retrospectively without the consent of the employee.

17. In this case, the Claimant was earning Kshs. 72000 in September – December 2015 semester according to the computation produced by the Respondent. He continued working in the subsequent semesters namely September – December 2016, January – April 2017, September – December 2017 and January- April 2018 without any letter of appointment communicating change of terms of service until 15.2.2018 when the Respondent wrote a letter communicating the decision of its Council to reduce the pay to Kshs. 54600 gross per unit per semester.

18. In my view, the said letter was mischievous to say the least. It was unfair and unlawful because that was an attempt to take away a benefit, which had legitimately accrued to the Claimant. I am persuaded that the doctrine of legitimate expectation applied to this case for the period between September-December 2016 semester to February 2018 when the Respondent communicated its decision to vary the terms of engagement to the Claimant. Thereafter the Claimant is presumed to have impliedly accepted the new terms of engagement by continuing to teach till the end of the semester.

RELIEF

19. In view of the foregoing finding, I find and hold that the Claimant is entitled to payment of wages at the old rate of Kshs. 72000 per unit per semester until February 2018. Thereafter he is only entitled to payment at the rate of Kshs. 54600 per unit per semester. The foregoing view is based on the fact that the terms of contact could not be varied retrospectively to the detrimental of the Claimant without his consent.

20. The Respondent contended that as a procedural requirement, the Claimant is obligated to present documentary evidence that he taught as a basis for payments. However, there seems to be no denial that the Claimant worked during the period under review if the internal memo dated 4.2.2018 and the attached computation of Claimants dues is anything to go by.

21. The Claimant did not file any documentary evidence to substantiate the tabulation annexed to his claim which as observed by the Respondent is much lower than the Kshs. 54600 per unit per semester offered by it. Consequently, I enter judgment for the Claimant for payment of Kshs. 611,100 less statutory deductions which is much less than the Kshs. 655,200 offered by the Respondent. The said sum shall be paid within 14 days from the date the Claimant presents the documents required for accountability purposes. The Claimant will also have costs and INTEREST AT COURT RATES FROM THE DATE OF FILING THE SUIT.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021

ONESMUS N. MAKAU

JUDGE

In the presence of:

Mr. Onsombi Advocate for the Claimant and,

Ms Mumbi Advocate for the Respondent.

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE