



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

ELRC CAUSE NO. 1495 OF 2016

DR. HIDETOSHI HASHIMOTO.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

1. Dr. Hidetoshi Hashimoto instituted this claim vide a Statement of Claim dated 27th May 2016 against University of Nairobi seeking payment of his dues and issuance of his Certificate of Service. He avers that vide a letter dated 22nd November 2013, he accepted a job offer from the Respondent for the post of Lecturer – Department of Political Science and Public Administration, College of Human Social Sciences, at a monthly salary of Kshs. 91,504/-. He averred that he arrived from the United States of America (USA) and reported at the Respondent institution on 9th June 2014 to start his employment and the Respondent later revised his remuneration to Kshs. 99,642/- vide a letter dated 2nd July 2014. He further avers that he however had to resign in mid-September 2014 due to health concerns and returned to the USA. The Claimant avers that despite carrying out his contractual obligations, the Respondent never paid his salary and house allowance and neither did it reimburse the costs of his trip from and back to the USA. He thus prays against the Respondent for an Order that the Respondent does pay him four months' salary, unpaid house allowance at 15%, air tickets and shipping costs as well as the costs of the suit.

2. The Respondent filed its Defence dated 12th October 2016 denying that it employed the Claimant as alleged in the Statement of Claim. It avers that the Claimant refused and/or neglected to accept its employment offer within one month as was required in the offer and that he only contacted it seven months after the employment offer had lapsed. That since there is no employer-employee relationship between the Claimant and the Respondent, the Respondent does not owe the Claimant any money as claimed and that moreover, his entry and stay in Kenya was illegal. The Respondent asserts that the Statement of Claim as filed is incurably defective, bad in law, incompetent and unfounded and should be dismissed with costs. It also denies the jurisdiction of this Court and prays that costs of the claim and interest be awarded to the Respondent. The Respondent also filed two Witness Statements both dated 22nd February 2021 by its Acting Registrar, Administration, Peter Mwai Muturi and its Chief Legal Officer, Fredrick Collins Omondi. They state that in line with the Government policy on engagement of foreigners, the letter of offer made to the Claimant dated 22nd November 2013 was rescinded and he was issued with another offer letter dated 2nd July 2014 for a period of two years. They assert that the Claimant reported to work without the required notice and that from the Respondent's records, it is not clear whether or not the Claimant taught. They assert further that the Respondent could not also act on the Claimant's request for payment of baggage and passage allowance as he was requested to regularise his employment. They further state that the Respondent stopped the process of obtaining a work permit on behalf of the Claimant when he abruptly terminated his contract without notice and that the Claimant thus owes the Respondent one month's salary in lieu of notice which it should be allowed to recover from him. It is Mr. Muturi's statement that the Claimant's claim as itemised has not been proven to the required standard and should be dismissed with costs while Mr. Omondi states that the prayers for alleged unpaid salaries and allowances as sought are time barred and should therefore not be granted by this Court.

3. The Claimant testified via video link as he was still domiciled in the United States and adopted his written statement and relied on it in this case and further asked the Court to look at his filed documents. He testified that he was appointed after Dr. Adams Oloo called him and that he got the appointment letter on email. He stated that he felt completely frustrated for not being paid any salary, airfare and shift allowance after he left Kenya in September 2014 despite the University promising to pay him the claimed dues. The Claimant stated under cross-examination that he attended class lectures at the Respondent institution and that he had course materials and attendance sheets for students, a copy of which he gave the University. He also stated that he was working as an instructor in foreign service at the US State Department when he received the letter of appointment and could not leave until around May of the following year and that he communicated the same to Dr. Adams Oloo who understood. He also affirmed that he did not attend any interview for the said position. He stated that he travelled to Nairobi from Washington DC through Moscow, Paris and London using his own money and that his trip back to the US was from Nairobi through Dubai UAE. He testified that he further paid baggage expenses for almost 10 boxes all with books which he shipped to Nairobi and back to the US. He also testified that he initially stayed in a guest house but eventually moved into a rented apartment and admitted that he did not have a work permit because the University did not provide any orientation. He stated that he submitted his resignation letter to Chairman Dr. Oloo which he thought was sufficient. In re-examination, he stated that after arriving in Nairobi, the University found it had made a mistake and they re-issued his appointment.

4. The Respondent witness, Peter Mwai Muturi adopted his witness statement and produced the list of documents dated 22nd February 2021. He testified that the Claimant was properly engaged by the Respondent but how he was supposed to report to work is what was amiss. He stated that the Claimant was offered 2 years appointment from the date he would assume duty and that the issue of an entry permit had been mentioned at paragraph 3 of the letter dated 2nd July 2014. He testified that the Claimant's duties were further to be assigned by the department Chairman and that the University cannot pay unless there is proof of actual work done. He asserted he had not seen any document showing the offer of lecturing, reiterating that the Claimant would not be allowed to serve without a work permit and that they could not validate whether the Claimant served without their knowledge. He explained that the Claimant should have produced the documents at the Central Personnel for him to be deemed employed at the University and get a Personnel File number which is submitted to Finance office with a write up and that the Finance office will only pay once HR confirms the validation. He confirmed under cross-examination that the Claimant accepted the employment offer by signing the acceptance within one month as required and that there is a record showing that the Claimant possibly went to the department and indeed reported as shown at pages 11-12 of Claimant's Bundle. He stated that the Claimant never taught, did not validate his position and neither did he have a personnel number. He stated in re-examination that the Claimant is recorded as having reported on Monday 9th and the air ticket produced shows he left on 12th which was after 3 days and that if at all he worked, it was on 9th, 10th and 11th. He asserted that the employment letter was inappropriate and irregular since the Claimant's stay was not regularised and that the Claimant should produce copies of the timetable and class attendance signed by the students which records he ought to have kept. That marked the end of oral testimony and parties were to file written submissions.

5. The Claimant submits that without prejudice, the remedies he seeks in the Claim ought to be paid to him because the same were duly admitted by the Respondent through its Chief Legal Officer, R.W Ngondo, vide an unequivocal letter dated 12th August 2015 annexed at page 23 of the Memorandum of Claim, proposing to transmit the settlement cheque as per the Demand letter. To this extent he relies upon the decision in **Choitrum v Nazari [1984] eKLR** where the Court held that admissions can be express or implied either on the pleadings or otherwise. He submits that Section 51(1) of the Employment Act requires in mandatory terms that employers issue employees with a certificate of service and failure to do so is an offence under Section 51(4). That in absence of any rebuttal to the said claim by the Respondent, the same is recoverable. He further submits that he is entitled to salary arrears as Section 17(1) of the Employment Act requires in mandatory terms that an employer pays the entire amount of the wages earned by or payable to an employee in respect of work done in pursuance of a contract of service and that Section 17(10) in fact criminalises an employer's refusal to pay wages making it punishable by a fine of Kshs. 100,000/- or 2 years imprisonment. On the claim of unpaid house allowance, the Claimant submits that his case and testimony which was that he was never housed by the Respondent and/or paid in lieu remains uncontested. He submits that under Section 31 of the Employment Act, an employer ought to house/accommodate his employees at all times and at the employer's own expense, and/or pay such sufficient sum as rent over and above the wages/salary and that it is only just and fair that he be paid the same and he relies on the finding of this Court in **Ayanna Yonemura v Liwa Kenya Trust [2014] eKLR**. Further, that since the Respondent did not dispute his claim for reimbursement of air ticket and baggage shipment to and from Kenya, the same is payable to him. The Claimant submits that because costs follow the event and considering the Respondent's attitude and time taken in the matter, the costs of the suit and interest should be granted to him.

6. The Respondent submits that it is a public university established under the Universities Act 2012 and operationalized by the University of Nairobi Charter, 2013 and that its operation are financed by public monies under the provisions of Public Finance Management Act 2012 and the regulations made thereunder. The Respondent submits that consequently, the power and function of recruitment, appointment, promotion and determination of terms and conditions of service for all staff of the University lies with the University Council under Sections 35 and 40 of the Universities Act 2013 as read together with Section 18 (8) (a) (b) of the University of Nairobi Charter 2013 as hereunder:

Section 35 (1) of the Universities Act, 2012 provides:

In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent- (a) a Council, which shall – (i) Employ staff;

Section 18 (8) (a) (b) of the University of Nairobi Charter 2013 provides:

Notwithstanding subsection (1), the Council shall have power—

(a) to determine the method of recruitment, appointment and promotion of all staff of the University;

(b) to appoint and determine the terms and conditions of service for all staff of the University;

7. The Respondent submits that it is evident from the two letters of appointment that the Claimant's purported recruitment and appointment was sanctioned by the then Deputy Vice-Chancellor contrary to the above mentioned statutory provisions. It is the Respondent's submission that the said letters are therefore of no effect and are null and void and that this Honourable Court should consequently dismiss any claims thereunder. The Respondent further submits that while the Claimant's new contract dated 2nd July 2014 was signed sometime on 14th July 2014, the air ticket produced in Court shows he left Kenya on 12th June 2014 and was therefore impliedly not in the country as at the date of the new contract. The Respondent submits that there is also no evidence before this Honourable Court that the Claimant indeed cancelled his return flight of 12th June 2014; there is no resignation letter; no letter on ill health from the doctor as alleged by the Claimant; and no receipts for payment of passage and baggage upon arrival into the country since an invoice does not demonstrate payment of the said passage and baggage. The Respondent submits that the same is therefore not payable. Further, the Respondent submits the Claimant failed to provide evidence of any timetable, class attendance and examination sheets for the alleged classes he taught for the period of June to September 2014. The Respondent submits that the Claimant has failed to prove he actually worked and has also failed to prove his case on the required standards. The Respondent cited the case of **China Wuyi & Co. Limited v Samson K. Metto [2014] eKLR**, where the court emphasized that as provided in Sections 107 and 108 of the Evidence Act, he who alleges must prove. It submits that the Claimant is consequently not entitled to the reliefs sought and that in the case of **Kenya National Union of Nurses v Permanent Secretary Ministry of Health & 2 Others [2020] eKLR**, the Court held that the claim for unpaid salary was not justified in law and public policy which contemplates payment of wages only for work done. The Respondent urges this Honourable Court to note that the Claimant's reliefs are pegged on the contract dated 2nd July 2014 which is null and void and further unenforceable for failing to comply with the provisions of Section 45(2) and 53(m) of

the Kenya Citizenship and Immigration Act as hereunder:

Section 45 (2)

It shall be the duty of every employer to apply for and obtain a work permit or a pass conferring upon a foreign national the right to engage in employment before granting him employment and it shall be presumed that the employer knew at the time of the employment that such person was among those referred to in section (1).

Section 53 (m)

A person who not being a citizen of Kenya, engages in an employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do by a work permit, or exempted from this provision by regulations made under this Act.

8. The Respondent submits that consequently, payment of any claims under the said contract of 2nd July 2014 will be contrary to the provisions of the law and public policy. To this end, the Respondent relies on the case of **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** where the Court set out the guidelines for determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract. It submits that this Court should be persuaded by the said guidelines to not enforce the contract dated 2nd July 2014 or enforce any claims thereunder neither could this matter be settled as alleged by the Claimant. The Respondent further submits that the issue of passage and baggage was not provided for in the Claimant's new contract and that the same is not payable. The Respondent submits that parties are bound by their contracts and the Court cannot rewrite the parties' contract. The Respondent relied on the case of **Emo Investment Ltd v Stephanus Petrus Kruger [2010] eKLR** citing with approval the authority in **National Oil v Pipeplastic Samkolit (K) Ltd & Prof. Samson K. Ongeru CA Nai. 95/1999** (unreported). On the issue of a Certificate of Service, the Respondent submits that as the Claimant has not demonstrated that he worked continuously for more than four (4) consecutive weeks, his claim for a Certificate of Service should be dismissed. The Respondent further submits that the Claimant's claims for special damages are statutorily time barred because they amount to a continuing injury ought to have been filed at the date of cessation or within 12 months of the said date. The Respondent submits that in consonance with this position, this Court has no jurisdiction to extend time within which to file the said claims and or entertain these claims.

9. The Claimant had sued for the recovery of reliefs for his alleged service to the Respondent. From the evidence adduced it was clear the Claimant was required to obtain a work permit and therefore it would seem the Claimant's contract with the Respondent dated 2nd July 2014 was never consummated as no work permit was obtained. In **Halsbury's Laws of England Fourth Edition**, the Formation of Contracts of Employment is expressed thus:

"A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract, loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal. A contract may generally be illegal because it is contrary to a statute or is an immoral contract...."

If the illegality affects the contract only for a certain period during its currency, the contract may be unenforceable for that period."

10. The Claimant having failed to obtain a work permit and the Respondent having failed to facilitate the acquisition of one before the departure of the Claimant means there was no valid contract between the parties. The Court notes that the Claimant however proved he had travelled to Kenya in June and left some 3 days later. Assuming he was able to teach, which fact was not proved, no evidence was tendered to indicate the Respondent was liable to pay for the 3 days worked nor was it tenable given that the Claimant did not have a work permit. It is unfortunate that the Claimant's expertise in political science was never utilised as the means of hiring him did not comport with the dictates of the law as he never obtained papers to work in Kenya hence his return to the United States 3 days after arrival. As the Respondent did not prove its counterclaim for notice pay both parties will bear their own costs. Suit dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE