



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 16 OF 2020**

**SETH OSUNDWA CHOLWA**

**APPELLANT**

**v**

**KISII UNIVERSITY**

**RESPONDENT**

**(An Appeal from the judgment and decree of the Honourable S.N. Makila**

**delivered on the 19<sup>th</sup> August 2020 in Kisii MELRC Cause No. 6 of 2019)**

**JUDGMENT**

1. Seth Osundwa Cholwa (the Appellant) sued Kisii University (the Respondent) before the Magistrates Court, and he stated the Issue in Dispute as:

Non-payment of salary in lieu of notice, leave allowances, compensation for unfair termination under sections 41, 49, 43, 45 and 47 of the Employment Act, 2007 and the Industrial Court Act No. 20 of 2011 and any other enabling provisions of the law.

2. The Cause proceeded to hearing, and in a judgment delivered on 19 August 2020, the Magistrate found no merit in the Cause and dismissed it.

3. The Appellant was aggrieved, and he lodged a Memorandum of Appeal with the Court on 11 September 2020 contending that:

(i) The learned Magistrate erred in law and fact by dismissing the Claimant's claim in its entirety when the Respondent admitted that he had not paid the Appellant his money and even undertook to pay the same.

(ii) The learned Magistrate erred in fact and in law by finding that the Claimant did not follow the procedure in getting payment by filling the claim forms, which claim forms the Appellant produced as evidence together with lecture attendance sheets and contract of employment.

(iii) The learned Magistrate erred in fact and in law by finding that the Claimant was not entitled to costs of the suit since he did not follow the procedure for payment of his dues, yet the Appellant produced evidence together with a demand letter.

(iv) The learned Magistrate erred in fact and in law by not giving time within which the Appellant should be paid his dues and when he is to be issued with a certificate of costs.

(v) The learned Magistrate failed to appreciate the submissions of the learned counsel for the Appellant.

4. The Respondent filed a Supplementary Record of Appeal on 20 April 2021, and pursuant to directions on 15 May 2021, the Appellant filed his submissions on 18 June 2021, while the Respondent filed its submissions on 29 June 2021.

5. The Court has considered the record and the submissions filed before this Court.

**Role of this Court on Appeal**

6. This being a first appeal, the Court is enjoined to re-evaluate the evidence before the lower Court and make its own findings on the evidence and facts but conscious that it did not see the witnesses.

### **Payment of salaries for semesters taught.**

7. In Grounds 1 and 2 of the Memorandum of Appeal, the Appellant was challenging the decision of the Magistrate in respect to payment for the semesters he had taught.
8. The Respondent admitted that the Appellant was entitled to the payments but asserted that he had not been paid because he had not made a claim for the same as required by the policies in place.
9. According to the testimony by the Respondent's witness, the Appellant was expected to fill a Claim Form and attach therewith the letter of appointment, examination sheet for each course to verify the number of students who paid fees and sat the examination and examination processing forms.
10. The witness further testified that the Claim Form would be approved by the Deputy Vice-Chancellor, Academics, Dean of Faculty, Chairman of the Department/Campus Director and Accountants in charge of lecturers' claim section and examinations section.
11. While dismissing this head of the claim, the learned Magistrate rendered:

On whether the Claimant is entitled to any redress, it was admitted by both parties that the Claimant had not been paid his dues for the semesters he had taught. The Claimant stated that he had pursued the payment but failed to avail documentation proving the same. I find that the delay in payment of the Claimant's dues for work done was self-inflicted, as he ought to have pursued the payment through the procedures laid out by the Respondent.

12. This Court has reviewed the documentary evidence placed before the learned Magistrate. The Appellant produced copies of Claim Forms and Student Registers.
13. However, from the record, it appears that the Appellant did not attach copies of examination sheets and examination processing forms.
14. It is clear to this Court that the Appellant presented incomplete documentation to the Respondent, and therefore this Court cannot fault the learned Magistrate's finding that the failure to pay the Appellant was self-inflicted.

### **Breach of contract**

15. The Appellant also alleged breach of contract in respect to underpayment of wages, overtime (public holidays and extra-hours, rest days and *pro-rata* leave) in his pleadings before the Magistrates Court.
16. The Court has relooked at the witness statements filed and record of the oral testimony. The Appellant failed to lay an evidential foundation to these alleged breaches of contract.
17. Although the Appellant did not directly attack in the Memorandum of Appeal the decision of the learned Magistrate, this Court is of the view that without that evidential foundation on underpayment of wages, overtime and accrued leave, these heads of the claim were not proved.

### **Certificate of Service**

18. A Certificate of Service is a statutory entitlement. The Respondent did not deny that the Appellant was entitled to one.
19. The Appellant has not disclosed whether he approached the Respondent to issue one to him, and the Respondent declined.
20. The Court, therefore, finds the Appellant's contention that the learned Magistrate should have given a time-frame for the issuance of a Certificate of Service a non-issue on appeal.

### **Unfair termination of employment**

21. Again, the Appellant did not directly challenge the decision of the learned Magistrate that he (the Appellant) was on a fixed-term contract(s) that automatically lapsed without need for notice.
22. The Court has looked at the contracts and agrees that the contracts lapsed automatically without the need for prior notice.
23. The question of unfair termination of employment is untenable in the circumstances.

### **Costs**

24. Section 12(4) of the Employment Act, 2007 provides that the Court should make a just costs order. This is a departure from the provision in the Civil Procedure Act that costs follow the event.
25. The Appellant did not succeed in his quest before the Magistrates Court, and this Court finds no basis to disturb the exercise of discretion by the learned Magistrate in directing each party to meet their own costs.

**Conclusion and Orders**

26. From the foregoing, the Court finds the Appeal without merit, and it is dismissed with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 6TH DAY OF OCTOBER 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Appellant V.A. Shibanda & Co. Advocates

For Respondent Nyairo & Co. Advocates

Court Assistant Chrispo Aura