



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1520 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**COLBERT OUMA OJIAMBO..... CLAIMANT**

*VERSUS*

**MOUNT KENYA UNIVERSITY..... RESPONDENT**

**JUDGMENT**

The facts of this claim are not contested. The claimant who is an advocate was engaged by the respondent, a university, to teach 3 classes at the respondent's school of law in Nairobi, as a part time lecture in the 2015 January to May semester. The contract was not reduced into writing. Both parties agree that the claimant taught a total of 3 classes a week for 15 weeks during the semester commencing in January and ending in May 2015, a total of 135 hours.

The parties however disagree on the rate of payment per hour and whether or not payment was made.

It is the claimant's averment that in the oral agreement between the respondent and himself the rate of pay was agreed at Kshs.2,800 per hour and that the same was never paid. The respondent on the other hand avers that parties agreed on an hourly rate of Kshs.2,000 and that it paid the claimant from its Equity Bank account which money was deposited into the claimant's account No. 0100002653127, Chiromo Branch in two instalments, the first being the sum of Kshs.114,107 paid on 12<sup>th</sup> June 2015 and the second being Kshs.58,507 paid on 21<sup>st</sup> August 2015. That the gross payment was Kshs.234,000 less tax of Kshs.60,387.

In the statement of claim dated 24<sup>th</sup> August and filed on 28<sup>th</sup> August 2015, the claimant seeks the following prayers –

- (a). The Court orders the Respondent to pay the Claimant Principal sum of (135 hours x 2,800)..... Kshs.378,000
- (b). Three months' interest on the principal sum at 16% per month from the due date to the time of filing the suit.
- (c). Interest on (a) and (b) above at Court's rates from date of suit until payment in full.
- (d). Costs of this suit.

The respondent filed a defence on 11<sup>th</sup> November 2015 in which it states that it paid the claimant Kshs.234,000 at the rate of Kshs.2,000 per hour. It denies owing the claimant the amount prayed for in the statement of claim.

The parties adopted their pleadings and documents and agreed to dispose of the suit by way of written submissions which they highlighted on 18<sup>th</sup> November 2019.

**Analysis and Determination**

I have considered the pleadings and submissions filed by the parties. In my opinion the only issues for determination are the rate of payment per hour, the total amount payable and whether or not the said amount was paid to the claimant by the respondent.

**Rate of Pay**

The claimant submits that parties agreed on a rate of pay of Kshs.2,800 per hour and that he is therefore entitled to Kshs.378,000 for the 135 hours taught. The claimant argues that it was the legal obligation of the respondent to reduce the contract into writing. He submits that the document exhibited by the respondent to prove the rates of pay being Framework of Payment is dated 1<sup>st</sup> December 2017 and is thus not relevant, having come long after the claimant's contract expired.

For the respondent it is submitted that it produced evidence in its list of documents dated 3<sup>rd</sup> April 2018 and supplementary list of documents dated 8<sup>th</sup> April 2018, which includes the respondent's Framework for Payment of Allowances. It submits that although the Framework for Payments is dated 2017, it had been paying all lecturers of law the same amount. That this was the culture of the respondent in payment of lecturers. That the claimant has not given sufficient reason why he should be paid differently at Kshs.2,800.

It is the respondent's submissions that in the circumstances of an oral contract the onus to prove the contract rests on the claimant and Section 10(7) of the Employment Act is not applicable in the circumstances of the oral contract.

It is further the respondent's submission that the court should consider what the ordinary course of business, custom, management practices and policies of the respondent avers in regard to payment of staff, relying on the decision in **Frank Mwangi Wanyeki v Bata Shoes (K) Limited (2010) eKLR**, where the court stated –

*"I agree with counsel for the plaintiff that as stated by G. C. Chesire, C.H.S. Foot and M.P. Furmston in their book—**The Law of Contract, 8<sup>th</sup> Edition**, from page 141, it is a well-established rule that a contract may be subject to terms that are sanctioned by custom, whether commercial or otherwise, although they have not been expressly mentioned by the parties. This is because the normal contract is not an isolated act, but an incident in the conduct of business or in the framework of some more general relation such as that of landlord and tenant. It will frequently be set against a background of usage, familiar to all who engage in similar negotiations and which may be supposed to govern the language of a particular agreement. In addition, therefore, to the terms which the parties have expressly adopted, there may be others imported into the contract from its context; and they, like their prototypes, may assume the character of conditions or of warranties. These implications may be derived from custom or they may rest upon statute or they may be inferred by the judges to reinforce the language of the parties and realize their manifest intention."*

As agreed by both parties, this was an oral contract. It was to last for a 15 week semester. I do not think the circumstances of the contract, where the claimant is a law lecturer, would be protected under Section 10(7) of the Employment Act which protects disadvantaged employees. In any event, the respondent produced both a Framework of Payments document, although dated 2017, and payment records which the claimant has acknowledged in its written submissions and during the highlighting thereof. The claimant on the other hand produced nothing. The figure proposed by the claimant as having been agreed upon as the hourly rate has no backing while the respondent's rate of Ksh.2,000 per hour is corroborated by the framework of payment, which the claimant disputes, and the schedules of payment which are dated 2015, the year when the claimant performed the duties for which payment is the subject matter of the suit herein.

The respondent's arguments about the rate of payment being a custom or tradition is not plausible as no evidence was adduced to establish custom or tradition.

I however find that from the evidence or record, especially the payment schedules produced by the respondent prepared soon after the claimant had performed his work, and which relate to the claimant and other lecturers, the rate of payment was Kshs.2,000 per hour.

On the second issue whether or not the payment was made, the claimant has produced his bank statements for the period 10<sup>th</sup> to 17<sup>th</sup> June 2015 and 20<sup>th</sup> to 30<sup>th</sup> August 2015 which does not reflect any payment by the respondent. He argues that the respondent has not proved that money it claims to have been paid actually reached the claimant's account, as all it established was internal processes for payment. The claimant denies receiving the said sums.

The respondent, on the other hand, produced internal documents showing payments to the claimant were cleared internally and instructions given to its bank, Equity Bank Account No. [...] which bears a "paid" stamp from the bank. The respondent further produced a schedule showing that its bank had instructions to pay the claimant's account Kshs.114,107 on 12<sup>th</sup> June 2015 and Kshs.59,509 on 21<sup>st</sup> August 2015. The claimant produced extracts from his account for the period 10<sup>th</sup> to 17<sup>th</sup> June and 20<sup>th</sup> to 30<sup>th</sup> August 2015. He did not show why he assumed that these were the dates when payments from the respondent were supposed to reach his account. He further did not rule out the fact that the payments may have reached his account after the period in the statements that he produced.

It is clear from the documents filed that the account numbers referred to by both the claimant and respondent is the same.

Having been given proof of payment, the claimant had the further responsibility to confirm from his bank that the payments were not received, if it is true that the same was never reflected in the said account on dates later than those produced. He did nothing beyond denying that the money reached his account and being minimalist with production of statements for the said account.

I find that the respondent has sufficiently proved that it paid the claimant the amount it owed him through the claimant's account No. 0100002653127, CFC Stanbic Bank, Chiromo Branch. I thus find that the claimant has not proved his case to the standard required by law with the result that the claim is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF APRIL 2020**

**MAUREEN ONYANGO**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**