

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 267 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

VIVIAN CHERONO.....CLAIMANT

VERSUS

KISII UNIVERSITY.....RESPONDENT

JUDGMENT

The claimant Vivian Cheronon was engaged by the respondent, a public chartered university, as part-time lecturer between the period January 2011 and August 2012. It was a term of the contract between the claimant and the respondent that payment for services rendered would be made “**after you have completed teaching and submitted grades.**”

It is the claimant’s averment that the respondent failed to pay her a sum of Kshs.561,620 which she now claims vide her memorandum of claim dated 18th September 2014 and filed on 25th September 2014.

The respondent filed a defence on 3rd November 2014 in which it denies owing the claimant the sum of Kshs.561,620. The respondent avers that the claimant earned and filed returns for Kshs.325,100 out of which the respondent paid Kshs.87,000 leaving a balance of Kshs.328,000 of which Kshs.24,750 was income tax which the respondent remitted to Kenya Revenue Authority vide cheque no. 019140 drawn on National Bank, Kisii Branch. The respondent further avers that it drew a cheque for the balance in the sum of Kshs.213,350 in favour of the claimant but the claimant failed to collect the cheque from its office.

The respondent avers that the claim herein is without merit, is misguided and has no basis. It prays that the same be dismissed with costs.

When this case came up for hearing on 29th March 2017, the court directed parties to carry out a reconciliation of accounts and report back to court on 27th June 2017. When parties failed to agree the court on 27th June 2018 directed that the suit be disposed of by way of written submission.

I have considered the submissions filed by both parties and it is apparent that the cause of disagreement is the interpretation of the letter of engagement.

The claimant submits that she was issued with a letter dated 28th August 2012 in which it is stated that she would be paid 35% of the fees collected. It is further the claimant’s submission that the office of the Dean, Faculty of Information, Science and Technology by letter dated 8th November 2012, confirmed that Entrepreneurship was one of the courses taught by the claimant for which she claims Kshs.45,200. That in addition the claimant is entitled to mileage at Kshs.32,000 and to Kshs.68,400 for subsistence.

The claimant therefore claims the following –

(a) BBAN 404 - 35% of fees collected at Kshs.45,200

(b) BBAM 102

(i) Subsistence Kshs.68,400

(ii) Mileage Kshs.32,000

Total Kshs.145,600

The claimant further claims costs, relying on the case of Municipal Council of *Mavoko –V- Galot Industries Limited (2014) eKLR* and *Cecilia Karuru Ngayu –V- Barclays Bank of Kenya and Another (2016) eKLR*.

For the respondent it is submitted that no amount is owing to the claimant following reconciliation of accounts as directed by the court on 29th March 2017. According to the respondent the claimant had misinterpreted the phrase “*all the teaching, practical and tutorial will be paid from 35% of the tuition fees collected.*” The respondent submitted that this did not mean that the claimant would be paid 35% of all the fees collected, but that out of all fees collected 35% would be set aside to pay all lecturers for teaching, practical and tutorial services.

According to the respondent the claimant was paid as follows –

ITEM	CLAIM NUMBER	TYPE	AMOUNT (KSHS.)	CHEQUE NUMBER
1	BBAM 100: INTRODUCTION TO BUSINESS BINM 231 :E-COMMERCE	Teaching and marking	29,000.00	
2	BBAM 102: PRINCIPLES OF MANAGEMENT -	Mileage and Subsistence Allowance	91,100.00	
3	BBAM401: ENTREPRENEURSHIP BBAM 102: PRINCIPLES OF MANAGEMENT	Teaching and marking	53,500.00	
4	BBAM 100: INTRODUCTION TO BUSINESS BINM 231 :E-COMMERCE	Mileage subsistence and	64,000.00	
	Total amount due		238,100.00	
	Less taxation		24,750.00	019140
	NET PAY		213,350.00	019139

The respondent submitted that the claim by the claimant for Kshs.45,200 for BBAM 401 for the period May – August 201 was paid together with the claim for BBAM 102 in the sum of Kshs.53,500 as reflected on the table above. The claim for subsistence and mileage for BBAM 102 for the period May – August 2012 was paid to the claimant in the sum of Kshs.91,100 as reflected in the table.

That the claim for BINM 231 for subsistence and mileage for the period May – August 2012 was made together with the claim for BBAM 100 and paid in the sum of Kshs.64,500 also reflected in the table above.

The respondent submitted that the total sum that was due to the claimant was Kshs.238,100 which after deduction of tax was Kshs.213,350 paid to the claimant vide cheque no. 019139, a copy of which was annexed to the submissions.

On costs the respondents submitted that the general legal principle on costs can be summed into three points:-

1. That costs follow the event.
2. “*The event*” is that the unsuccessful party will be ordered to pay the costs of the successful party;
3. The court has discretion as to who pays costs, the amount thereof and when they are to be paid.

The discretion must be exercised judiciously; it must not be exercised arbitrarily but in accordance with reason and justice.

It is the respondent’s submissions that the claim was filed prematurely and only a sum of Kshs.213,350 was proved out of a claim for Kshs.561,620. That the amount outstanding was paid before the claim was filed.

The respondent relied on the decision of Radido J. in *Ismail Hassan Abullahi –V- Kenya Ports Authority (2013) eKLR* in which the Judge stated “costs do not follow the event in the Industrial Court unlike in proceedings under the civil procedure regime. The court is given the discretion to make a costs order it considers just.”

The respondent further relied on the decision in the case of *Little Africa Limited –V- Andrew Mwiti Jason (2014) eKLR*.

The respondent prays that each party bears its costs.

Determination

I have considered the pleadings and submissions by the parties.

According to the claimant what has not been paid is Kshs.145,600 made up as follows –

(c) BBAN 404 - 35% of fees collected at Kshs.45,200

(d) BBAM 102

(iii) Subsistence Kshs.68,400

(iv) Mileage Kshs.32,000

Total Kshs.145,600

There are no records produced in court by the claimant either having been engaged to teach the subject BBAN 404 or any claim form in respect of the same. The only letter attached to the claimant's documents in which mention is made of 35% is dated 28th August 2012 and is in respect of BBAM 401: Entrepreneurship, for the period 21st May to 17th August 2012. The only other subjects the claimant was engaged to teach according to the documents on record are BBAM 100: Introduction to Business; BINM 231: E-Commerce and BBAM 102: Principles of Management.

I find no proof of any payment due in respect of the subject BBAN 404 and dismiss the claim.

For BBAN 102, the respondent's summary table reflects that a sum of Kshs.91,100 was paid in respect of subsistence and a further sum of Kshs.53,500 was paid in respect of subsistence for BBAM 401 and BBAM 102.

The claimant does not state that the amounts paid do not include the sum of Kshs.68,400 in respect of subsistence and Kshs.32,000 in respect of mileage that she has claimed.

From the foregoing, the claimant has on a balance of probabilities, not proved her claim for the said subsistence and mileage claims with the result that the same is dismissed.

Having dismissed both claims by the claimant and noting that the payments of the final amounts owed to the claimant as admitted by the respondent were made by cheque dated 3rd September 2014 while the claim herein was filed on 25th September 2014 after the said payment, I order that each party bears its costs.

DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 14TH DAY OF FEBRUARY 2019

MATHEWS NDERI NDUMA

JUDGE