



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 292 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILSON NYAIGOTI BICHANGA.....CLAIMANT

VERSUS

KISII UNIVERSITY.....RESPONDENT

JUDGMENT

Vide memorandum of claim dated 21st and filed on 29th October 2014 the claimant avers that he was employed by Kisii University, a public chartered university, to teach as a part-time lecturer for the period May 2012 to December 2013. That pursuant to the terms of the contract he completed his teaching services and submitted grades as required by the terms of the contract but the respondent failed to pay his honorarium, subsistence and mileage as agreed.

He prays for payment as follows –

1. SEPTEMBER – DECEMBER, 2012

COMS 101: COMMUNICATION SKILLS C.F. 3.0 -

BSC BIOMEDICAL SCIENCES - NYAKONGO TOWERS (JAB)

- a) Honorarium 1,600 x 45 Hours Kshs.72,800
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.172,800

2. JANUARY – APRIL , 2013

ENG 211: SOCIOLINGUISTICS C.F. 3.0 –

B.E.D. (ARTS) - MAIN CAMPUS (JAB)

- a) Honorarium 1,600 x 45 Hours Kshs.72,800
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.172,800

3. JANUARY – APRIL , 2013

EDCI 346: ENGLISH SUBJECT METHODS C.F. 3.0 –

B.E.D. (ARTS) - DOWN TOWN CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

COMS 101: COMMUNICATION SKILLS C.F. 3.0 –

B.E.D (ARTS) – OGEMBO CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

COMS 0121: COMMUNICATION SKILLS C.F. 3.0 –

DIP IN EDUCATION - OGEMBO CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

COMS 101: COMMUNICATION SKILLS, C.F. 3.0

BSC. BIOMED; NUTRITION & DIATETICS - NYAKONGO
TOWERS (JAB)

- a) Honorarium 1,600 x 45 Hours Kshs.72,800
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.172,800

4. MAY – AUGUST , 2013

COMS 101: COMMUNICATION SKILLS, C.F. 3.0

BSC NURSING - NYAKONGO TOWERS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

EDCI 0314: LITERATURE METHODS C.F. 3.0

B.ED (ARTS) DOWN TOWN CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

COMS 101: COMMUNICATION SKILLS C.F. 3.0

B.ED (ARTS) - OGEMBO CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

5. MAY – AUGUST , 2013

EDCI 0314: LITERATURE METHODS C.F. 3.0

DIP. EDU (ARTS) - DOWN TOWN CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

EDCI 0314: LITERATURE METHODS C.F. 3.0

DIP. EDU (ARTS) - OGEMBO CAMPUS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

COMS 101: COMMUNICATION SKILLS, C.F. 3.0

BSC NURSING - NYAKONGO TOWERS (SSP)

- a) Honorarium 2,000 x 45 Hours Kshs.90,000
- b) Transport allowance (500 x 2) x 2) x 16 weeks Kshs.32,000
- c) Subsistence allowance (2150 x 2) x 16 weeks Kshs.68,400

Kshs.190,800

Total Kshs.2,235,600

The claimant prays for payment of the said sum of Kshs.2,235,600, costs and interest.

In the defence dated 2nd December 2014 filed by the respondent on 9th December 2014, it admits engaging the claimant as stated in the memorandum of claim. It however denies the rates claimed by the claimant and states that the agreement was to pay as follows –

1. SEPTEMBER – DECEMBER, 2012

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT – OGEMBO CAMPUS

COMS 101: COMMUNICATION SKILLS C.F. 3.0 -

- a) Honorarium 500 x 45 Hours Kshs.60,000
- b) Marking Kshs.2,000
- c) No transport allowance (as per appointment letter) Nil
- d) No subsistence allowance (as per appointment letter) Nil

Kshs.60,000

2. JANUARY – APRIL , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

ENGL 211: SOCIOLINGUISTICS (JAB)

- a) Honorarium 1,600 x 45 Hours Kshs.72,000
- b) Marking Kshs.2,000
- c) Transport allowance (as per appointment letter) Kshs.5,000
- d) No subsistence allowance (as per appointment letter) Nil

Kshs.79,000

3. JANUARY – APRIL , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

ENGL 346: ENGLISH SUBJECT METHODS

- a) Honorarium 1,100 x 45 Hours Kshs.49,500
- b) Marking Kshs.2,000
- c) No transport allowance (as per appointment letter) Nil
- d) No subsistence allowance (as per appointment letter) Nil

Kshs.51,500

4. JANUARY – APRIL , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

COMS 101: COMMUNICATION SKILLS

- a) Honorarium 500 x 45 Hours Kshs.22,500
- b) Marking Kshs.2,000
- c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.24,500

5. MAY – AUGUST , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

COMS 0121: COMMUNICATION SKILLS

a) Honorarium 500 x 45 Hours Kshs.22,500

b) Marking Kshs.2,000

c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.24,500

6. MAY – AUGUST , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

COMS 101: COMMUNICATION SKILLS

a) Honorarium 1,600 x 45 Hours Kshs.72,000

b) Marking Kshs.2,000

c) Transport allowance (as per appointment letter) Kshs.20,000

d) No subsistence allowance (as per appointment letter) Nil

Kshs.94,000

7. MAY – AUGUST , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

COMS 101: COMMUNICATION SKILLS

a) Honorarium 1,600 x 45 Hours Kshs.90,000

b) Marking Kshs.2,000

c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.92,000

8. MAY – AUGUST , 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT

EDCI 0312: LITERATURE METHODS

a) Honorarium 666 x 45 Hours Kshs.29,970

b) Marking Kshs.2,000

c) Transport allowance (as per appointment letter) Kshs.20,000

d) No subsistence allowance (as per appointment letter) Nil

Kshs.94,000

9. SEPTEMBER – DECEMBER, 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT – OGEMBO CAMPUS

COMS 101: COMMUNICATION SKILLS

a) Honorarium 500 x 45 Hours Kshs.22,500

b) Marking Kshs.2,000

c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.24,500

10. SEPTEMBER – DECEMBER, 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT – DOWN TOWN CAMPUS

EDCI 0314: LITERATURE METHODS

a) Honorarium 500 x 45 Hours Kshs.36,000

b) Marking Kshs.2,000

c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.38,000

11. SEPTEMBER – DECEMBER, 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT – OGEMBO CAMPUS

EDCI 0314: LITERATURE METHODS

a) Honorarium 500 x 45 Hours Kshs.22,500

b) Marking Kshs.2,000

c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.24,500

12. SEPTEMBER – DECEMBER, 2013

FACULTY OF EDUCATION AND HUMAN RESOURCE AND DEVELOPMENT – OGEMBO CAMPUS

COMS 101: COMMUNICATION SKILLS

a) Honorarium 500 x 45 Hours Kshs.83,970

b) Marking Kshs.2,000

c) No transport allowance (as per appointment letter) Nil

d) No subsistence allowance (as per appointment letter) Nil

Kshs.85,970

TOTAL Kshs.632,400

The respondent avers that out of Kshs.632,440 it admits owing the claimant, it has since made part payment of Kshs.223,000 vide cheque No. 01993 drawn on National Bank Limited, Eldoret Branch and is ready and willing to pay the balance of Kshs.227,129.

When the case came up for hearing on 29th March 2017, the court directed parties to reconcile accounts. The reconciliation revealed that no amount was outstanding between the claimant and the respondent.

The only issue for determination is therefore the issue of costs.

The claimant submits that in view of the fact that the decretal sum was paid after filing suit, he is entitled to costs. The claimant relied on the case of ***Municipal Council of Mavoko –V- Galot Industries Limited (2014) eKLR*** in which the court held that costs follow the event citing with approval the decision in the case of ***Hussein Janmohamed –V- Twensche overseas Trading Company Limited (1967) E.A 287*** in which the court held–

“To my mind, not only where there is no proper grounds for the exercise of the court’s discretion is depriving the successful defendant of his costs, which as noted would constitute an unjudicial exercise of the discretion, but the purported grounds were as indicated not supported by any evidence.”

For the respondent it is submitted that the claim by the claimant was not based on the terms of service agreed upon between the parties and was aimed at unjust enrichment. That for a lecturer to receive payment the same must be processed after confirmation that the lecturer covered the course work, set and marked exams and the exam results were forwarded to the heads of department of the various campuses. It is submitted that the claimant was fully aware of this process but came to court prematurely.

It is further submitted that the only amount that was due to the claimant was Kshs.632,440 and not the sum of Kshs.2,235,600 claimed in his claim. That at the time of filing suit only a sum of Kshs.227,129 was outstanding, awaiting verification. That the respondent’s computation was never disputed by the claimant.

It is further the respondent’s submission that the claimant did not adhere to Sections 47, 48, 49 and 87 of the Employment Act and bypassed the Labour Officer to file his claim directly in court. That the court ordered the parties to reconcile accounts and come back with correct figures following which the parties found that there was no valid claim.

The respondent prays that for these reasons the court should not award any costs to the claimant, relying on the decision in ***Ismail Hassan Abdullahi –V- Kenya Prots Authority*** in which Radido J. stated

“costs do not follow the event in the Industrial Court unlike in proceedings under the civil procedure regime. The court is given a discretion to make a costs order it considers just.”

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

Determination

Section 12(4) of the Employment and Labour Relations Court Act provides that the issue of costs is to be determined by the court “*as the court considers just*”. The costs in this court therefore do not follow the event.

In the present case the claimant filed suit claiming a sum of Kshs.2,235,600. In its defence the respondent admitted a sum of Kshs.632,440 which was subsequently paid after the filing of this claim.

It is not contested by the respondent that payment was made to the claimant after the filing of this claim. This therefore means that the claimant is the successful party in this claim. Had the respondent not been in default there would have been no need to file the suit.

For the foregoing reasons it is the opinion of the court that the claimant is entitled to his costs having been compelled by the respondent to file suit. The court further notes that the respondent had the opportunity to pay the entire decretal sum either upon receipt of the demand letter or upon service of summons but did not. Instead the respondent filed a defence in which it admits the sums that have now been paid.

In the circumstances it is the opinion of the court that it is reasonable to compensate the claimant for the expenses incurred to file and prosecute this suit.

I therefore award the claimant the costs of this suit based on the admitted sum of Kshs.632,440 to be either agreed upon by the parties or to be taxed.

Orders accordingly.

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