



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 212 OF 2018

VALENTINE ATAKACLAIMANT

VERSUS

KARATINA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent, a chartered public university, for determination of the issues he framed as failure to pay contractual dues; failure to issue written employment contract; failure to issue a certificate of service; unfair labour practices and unfair wages. The Claimant filed a memorandum of claim and an amended claim in which he averred that he was employed to teach 8 courses at the Respondent's Karatina Campus and Nairobi Campus but was not given any contract of employment. He averred that it was an implied term of the contract that he would not be subjected to unfair labour practices. He averred that he taught company law, elements of administrative law, criminal law, law governance and public safety and the law of evidence for which he was entitled to be paid Kshs. 54,600/- gross for each of the 8 courses he taught. He averred that he was therefore entitled to receive the total sum of Kshs. 436,800/- for the courses he taught. He averred that the Respondent *ex post facto* issued him with purported letters of engagement which were for criminal law and law of evidence taught at the Nairobi campus in 2 semesters. He averred that the Respondent stopped assigning him any teaching units effectively terminating his employment but failed to issue the Claimant with a certificate of service. The Claimant averred that the Respondent issued him with the letters of engagement after it had tacitly terminated his employment and required him to sign the letters as a condition for him to be paid his long standing dues. He averred that the letters were in breach of Section 10 of the Employment Act as they were not issued at the start of the contract and lacked particulars. He averred that the Respondent in reaction to the suit herein paid him Kshs. 152,880/- in purported payment of the Claimant's overdue wages. He thus sought an order of declaration that the various part time employment contracts dated 24th March 2017 were unlawful, null and void, an order of declaring the fair remuneration at fair market rate, an order of declaration that the Claimant's employment was wrongfully and unlawfully terminated by the Respondent, an order of declaration that the Respondent breached the Claimant's right to fair labour practices, an order directing the Respondent to forthwith pay the Claimant a sum to be determined by the court less the Kshs. 152,880/- paid, an order for damages for wrongful and unlawful termination of employment, an order for general damages for breach of the Claimant's right to fair labour practice, an order for exemplary damages, interest on the sum claimed at court rates, costs on full indemnity basis and an order directing the Respondent to issue the Claimant with a certificate of costs.

2. The Respondent filed a defence in which it was averred that the Claimant was engaged on part time basis and not full time basis. It averred that he was entitled to fair pay but denied that it never gave the Claimant a letter of engagement or inform him of the conditions of service. The Respondent vehemently denied the allegations made against it by the Claimant and averred that the Claimant was entitled to teach a particular course for 3 contract hours in every week and set an examination paper for the course, invigilate the paper and mark the scripts. The Respondent averred that the Claimant was entitled to gross remuneration of Kshs. 34,000/- for teaching one bachelor's course and gross remuneration of Kshs. 31,200/- for teaching a diploma course. It averred engagement on part time basis does not entitle one to other benefits. The Respondent averred that the remuneration paid on part time basis is comparable to those paid on a full time lecturer engaged by the Respondent. The Respondent averred that the part time lecturers are given a free hand to determine the time to teach as much as a time table is usually availed as a guide. The Respondent submitted that the Claimant indicates when he taught when filing a claim form so that a payment can be processed. The Respondent averred that the Claimant had not submitted his claim for the unpaid courses amounting to Kshs. 195,000/- and that the Respondent had paid Kshs. 218,400/- for those courses which the Claimant had lodged claim forms. The Respondent averred that it is engaged in other ventures on a full time basis and as such the remuneration derived from the part time engagement is deemed as charitable income under the Income Tax Act which the Respondent is obliged to withhold and submit to the Kenya Revenue Authority. The Respondent averred that it was within the knowledge of the Respondent that the Claimant was engaged as an advocate practicing in the name and style of Ataka Kimoni & Ohoth Associates Advocates and that it was not privy to the Claimant's returns filed with the Kenya Revenue Authority. The Respondent averred that the Claimant predominantly taught at the Nairobi Campus which was downgraded to a liaison office and the Claimant was engaged on a need basis and in this case there was no need to continue engaging him after the change of status of the Nairobi learning site. The Respondent averred that the it was not in breach of Article 41 as alleged and that the Claimant had not proved he was entitled to the damages arising from the alleged breach. The Respondent averred that the amended claim was filed as an afterthought and as abuse of the court process. The Respondent offered to pay the pending claim of Kshs. 195,000/-, which is admitted, by facilitating the claim process the Claimant had declined to and costs based on the outstanding amount. The Respondent averred that however, the Claimant attempted to extort from the Respondent a grossly overstated party and party costs and that was what led to the

filing of the amended claim. The Respondent thus averred that save for the admitted sum of Kshs. 195,000/- stated in gross amount, the rest of the claims in the claim be dismissed, costs of the suit and interest on the costs.

3. The parties consented to disposing the suit by way of documentation as provided for under Rule 21 of the Employment & Labour Relations Court (Procedure) Rules 2016. The Claimant submitted that he was employed by the Respondent to teach 8 courses between August 2014 and December 2016 and that despite diligently serving the Respondent as lecturer the Respondent had failed to pay him the remuneration for the service. The Claimant submitted that the Respondent declined despite repeated requests to issue the Claimant with a letter of employment. The Claimant submitted that the failure to issue the letters of appointment was revealed by the email correspondence between them dated 17th November 2014. The Claimant submitted that the Respondent imposed the condition of part time basis in 2017. The Claimant submitted that adducing his 2018 practice status was irrelevant as the claim related to the period between August 2014 to December 2016. The Claimant submitted that the Respondent had unlawfully withheld his salary during the entire period of employment. He submitted that withholding his salary constituted unfair labour practices for which he was entitled to recompense. He cited the case of **Emmanuel Makoro v Permanent Secretary Office of the Prime Minister & 2 Others [2017] eKLR** for the holding that he was entitled to damages. He submitted that from the pleadings by the Respondent his termination was on account of downgrading of the Nairobi campus which was an admission that his termination was on account of redundancy. He submitted that the Respondent did not comply with Section 40 of the Employment Act. He relied on the case of **Francis Maina Kamau v Lee Construction [2014] eKLR** and argued that the Respondent failed to comply at all with the provisions of Section 40. The Claimant cited the case of **Yvonne Achitsa Oderere v Maseno University [2017] eKLR** on unfair labour practices. He thus sought the grant of the prayers in his claim.

4. The Respondent submitted that the Claimant was engaged on part time basis and that the letters of appointment were issued for a particular semester and for stated courses to be taught. The Respondent submitted that the part time teaching took place either in the evening from 5.00pm to 8.00pm or on weekends. The Respondent submitted that the Claimant was engaged for a total of 42 hours spread over the 14 weeks and on the 15th week was to administer exams. The Respondent argues that the maximum number of hours the Claimant could be engaged for was 45 hours in the part-time lecturing. The Respondent submitted that the kind of contract the Claimant was engaged in was not one that could not meet the threshold for the strict application of Section 9 and 10 of the Employment Act. The Respondent submitted that the contract it engaged in was recognized under the International Labour Convention on Part-Time Work No. 175 of 1994 which applies in Kenya though it is not fully domesticated. The Respondent submitted that the Convention allows for the exclusion of some workers from the scope of protections enlisted in Article 7 if the hours of work or earnings are below specified thresholds. The Respondent submitted that it was not in breach of any statutory provisions for the Claimant to be entitled to any general damages. The Respondent submitted that remuneration is on the basis of hours worked and that the Claimant was required to fill the claim form as a basis for the payment. The Respondent submits that this was not done. The Respondent submitted that the case of **Emmanuel Makoro v Permanent Secretary Office of the Prime Minister & 2 Others (supra)** cited by the Claimant could be distinguished from this case as the terms and conditions were different from the one of the Claimant herein. The Respondent submitted that the Claimant had been told what he needs to do in order for his part-time claim to be paid. The Respondent asserts that the 2 cases cannot compare. On the issue of underpayment the Respondent submitted that the calculation used by the Claimant in illustrating part time payment is not in accordance with usual practice of Universities as it does not take into account the fact that working part time means working for less hours than those comparable for full time workers. The Respondent submitted that Article 5 of the International Labour Convention on Part-Time Work No. 175 of 1994 provides that the basic wage is calculated proportionately on an hourly, performance related or price-rate basis whichever is lower than the basic wage of comparable full time workers. The Respondent submitted that the Claimant had not been terminated as alleged and denied any unfair labour practices. In relation to deductions the Respondent submitted that there was payment of PAYE as exhibited and the Claimant had been issued with his P9 form and could verify the payment of taxes on the automated system of I-TAX from his account with Kenya Revenue Authority. The Respondent submitted that the earnings from part-time work are considered as sundry expenses as it is assumed the Claimant is engaged in another full-time venture. The Respondent submitted that it was within its knowledge that the Claimant was an advocate in active practice as shown by the search on the LSK portal. The Respondent submitted that it was willing to arrive at the out court of court settlement and had acceded to pay Kshs. 195,000/- which was admitted as the gross pay pending for the Claimant and costs based on the outstanding sum. The Respondent urged the court to take that into account when exercising its discretion on the issue of costs.

5. In the dispute before the court, it was clear the Claimant was engaged on part-time basis as exhibited in the evidence he annexed to his memorandum of claim. Though the contracts are all curiously dated 24th March 2017, they were executed by the Claimant in acceptance of the terms therein. He is, it is admitted, an advocate of the High Court of Kenya and therefore alive to the considerations on contract. Where an offer is made and an acceptance given, the contract is complete and in his case he accepted the contract offered on 24th March 2017. He did not endorse the contracts 'without prejudice' to denote he had not accepted the variation in pay. The Respondent on its part argues that the contracts were always part-time and exhibits a few contracts that were not signed in acceptance by the Claimant. There is basis for part-time work whether formal or informally structured. The ILO Convention known as the Part-Time Work Convention, 1994 (No. 175) makes provision in Article 1 on the definition of part-time work. It provides:-

for the purposes of this Convention:

(a) the term part-time worker means an employed person whose normal hours of work are less than those of comparable full-time workers;

(b) the normal hours of work referred to in subparagraph (a) may be calculated weekly or on average over a given period of employment;

(c) the term comparable full-time worker refers to a full-time worker who:

(i) has the same type of employment relationship;

(ii) is engaged in the same or a similar type of work or occupation; and

(iii) is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the

same enterprise or, when there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned;

Clearly, there is provision for employment as a part-time worker in international conventions. Under the Employment Act, there is recognition of "piece work" which means any work the pay for which is ascertained by the amount of work performed irrespective of the time occupied in its performance. There is also the concept of "task" which means such amount of work as can, in the opinion of an authorized officer, be performed by an employee in an ordinary working day. The lecturing method used by the Respondent fits more in the mould of piecework though there is a definite period that the Respondent expected the Claimant to execute the task. Read together with the ILO Part-Time Work Convention, 1994 (No. 175), the Claimant was engaged on part time basis as evidenced further by his own contracts of engagement. He was entitled to receive pay for the work done and he was unable to demonstrate that he was entitled to more than the Kshs. 195,000/- the Respondent concedes he is entitled to. The Respondent will therefore be required to make payment of the sum due. The Claimant had to seek interposition of the Court and as such the Claimant is entitled to costs on the sum that was wired after he pursued the Claim and the sum now outstanding. The Respondent does not deny it paid some Kshs. 218,400/- due to the Claimant and owes a sum of Kshs. 195,000/- gross. In the final analysis I enter judgment for the Claimant against the Respondent for:-

1. Kshs. 195,000/- gross pay;
2. Costs to scale on the sum of Kshs. 413,400/-.

It is so ordered.

Dated and delivered at Nyeri this 31st day of October 2019

Nzioki wa Makau

JUDGE