



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 331 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PROF. HELLEN ATIENO.....CLAIMANT**

**VERSUS**

**MASENO UNIVERSITY.....RESPONDENT**

**JUDGMENT**

The claimant Prof. Hellen Atieno was employed by Maseno University, the respondent in the Department of Music and Theatre Studies in 1991. She served the respondent until 30<sup>th</sup> November 2012 when she voluntarily resigned. At the time of resignation the respondent owed her salary arrears of Kshs.583,000.

Upon resignation the respondent paid the outstanding arrears but retained the sum of Kshs.283,000 on grounds that the claimant failed to return equipment of the same value, which was the property of the respondent.

It is the claimant's averment that the said equipment is not the property of the respondent as she acquired the same. The claimant produced cash sale receipts for the equipment at pages 10 and 11 of the memorandum of claim.

**Claimant's Submissions**

When this case came up for hearing the parties agreed to dispose of the same by way of pleadings, documents and written submissions.

It is the claimant's submission that the deduction of Kshs.283,000 from her final dues was illegal as the items in respect of which the deductions were made were purchased by her as evidenced by the cash sale receipts she submitted. It is her further submission that the donation of Kshs.300,000 SELAM instruments was received in 2007 well after she bought the items alleged to be SELAM instruments.

The claimant submits that although it is alleged she was sent to Nairobi to purchase the instruments, no voucher was produced to prove that she was actually sent to Nairobi and paid fare of Kshs.10,000 and subsistence allowance of Kshs.13,000. She further questions why the fare and subsistence allowance should be recovered from her terminal benefits if indeed she was on official duty as alleged.

The claimant further submits that the value of the items are highly inflated as no receipts have been produced for the actual value. It is submitted that the claimant resigned on 13<sup>th</sup> August 2012 and it is illogical to deduct from her salary after resignation what should have been deducted while she was still an employee noting that the SELAM Project ended in 2009 and the claimant filed a report and list of instruments, which the respondent has not exhibited. It is further submitted that the claimant was cleared in 2014, two (2) years before she resigned.

She prays that judgment be entered as prayed.

**Respondent's Submissions**

The respondent submits that there is no dispute that the claimant was, while in the employment of the respondent, in charge of the Music Department and SELAM instruments, which were donated to the respondent. The respondent submits that the receipts attached to the claimant's documents have never been mentioned by the claimant yet the issue of the instruments came up before her resignation. That she had never before claimed ownership of the equipment that were being used at the institution.

The respondent referred to the internal memo at page 9 of its list of documents dated 24<sup>th</sup> November 2009 in respect of SELAM instruments in which the claimant promised to make a report on the instruments and hand over the SELAM instruments to the institution. It is submitted that the claimant has not submitted the report to court or any document to confirm that she prepared the report and handed over the instruments.

The respondent further referred to the letter dated 10<sup>th</sup> October 2013 at page 12 of the claimants list of documents. The letter from the Acting Chairperson of the Department of Music and Theatre Studies gives details of instruments which were never returned by the claimant who was in charge of the SELAM Project. The respondent submits that the issue of the SELAM instruments had been outstanding since 2009 and thus did not just spring up upon the claimant's resignation.

It is the respondent's submission that it was justified to withhold Kshs.283,000 from the final dues of the claimant on account of the musical equipment that the claimant failed to return to the respondent.

### **Determination**

The only issue in dispute in this suit is whether the respondent is justified in withholding the sum of Kshs.283,000 from the terminal dues of the claimant on account of SELAM musical instruments.

From the pleadings, documents and submissions of the parties, it is evident that sometime in 2007, a project known as SELAM entered into an agreement with the respondent for capacity building in traditional and western music instruments. Pursuant thereto SELAM Project was to donate Kshs.389,000 for the instruments and Kshs.300,000 seed funds for payment to trainers for the project period of 6 months from August 2007. A letter and documents acknowledging receipt of the funds by the respondent are exhibited at appendix 2 to 4 of the respondent's bundle of documents.

By an internal memo dated 20<sup>th</sup> November 2009 from the Dean, Faculty of Arts and Social Sciences to the claimant, she was asked to comment on the state of instruments and equipment as had been requested in a letter from the Chairperson of the Department of Creative and Performing Arts dated 22<sup>nd</sup> September 2009 which the claimant had responded to on 28<sup>th</sup> September 2009. In the claimant's response of 24<sup>th</sup> November 2009 she stated as follows –

*“From: Prof. Hellen A. Odwar*

*Date: November 24, 2009*

*To: Dean, FASS*

*Ref:*

*RE: SELAM INSTRUMENTS*

*Thank you very much for your letter dated 20<sup>th</sup> November 2009 on the above subject. I can read from your letter that the head, Creative and Performing Aits, has consulted with you over the subject as per my response to her letter dated 22<sup>nd</sup> September 2009 since neither of us gave you copies of our correspondences.*

*Selam project is now officially over and I am just about to compile my report on Selam project to the project owners, and the university I, being the project coordinator.*

*I request you to give me one week or so to collate my report-, which will include equipment/instruments of the project. I will be able in this respect to hand over officially to the university any project equipment/instruments according to the memorandum of understanding signed between Selam and Maseno University.*

*Thank you for your patience and understanding.*

*SIGNED*

*Prof. Hellen A. Odwar*

*Copy to: Prof. Barrack Owuor – Director, IRI*

*H.O.D – Department of Creative and Performing Arts”*

The claimant has not stated whether she prepared the report as promised in her memo. It is clear that the issue remained outstanding and was picked up at the time she was clearing. It would have been so easy for the claimant to give a copy of her handing over report if indeed there was any, upon which she would be cleared. The value of the instruments in issue are as set out at page 16 of the claimant's documents which is attached to the letter from the Acting Chairperson of the Department of Music and Theatre Studies, which at the last paragraph at page 12 of the claimant's bundle states–

<b>Item</b>	<b>No.</b>	<b>Unit Price (Kshs.)</b>	<b>Total Costs (Kshs.)</b>
1. Acoustic Guitar	2	25,000	50,000

2. Keyboards	2	30,000	60,000
3. Powered Mixer	1	60,000	60,000
4. Speakers (Yamaha)	2	40,000	80,000
5. Speaker stands	1	10,000	<u>10,000</u>
<b>Sub-Total</b>			<b>262,000</b>
Transport to Nairobi to buy the equipment			10,000
Subsistence for 2 days		6,500	<u>13,000</u>
<b>TOTAL</b>			<b><u>283,000</u></b>

The receipts annexed to the claimant's bundle of documents at pages 10 and which are dated 24<sup>th</sup> February 2005 do not explain the claimant's own undertaking to hand over the SELAM instruments by her memo dated 24<sup>th</sup> November 2009. They further prove that the instruments in the receipts are not the same as those that were donated by SELAM, which are the subject of the claimant's memo of 24<sup>th</sup> November 2009.

The claimant having failed to prove that she handed over the SELAM equipment cannot complain about the recovery of the value thereof from her terminal benefits.

For the foregoing reason I find no merit in the claim and dismiss it with costs.

**DATED AND SIGNED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**