



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 18 OF 2016**

**PHIDES MBURA NYAGAH (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF FAUSTIN NYAGAH MUKUI-DECEASED) .....CLAIMANT**

**-VERSUS-**

**EMBU UNIVERSITY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> May, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 04.02.2016 through Mang'are and Associates Advocates. The claimant prayed for judgment against the respondent for:

- a. Payment of a sum of Kshs.1, 205, 549.90 being 3 days worked in December 2013 Kshs.6, 670.65; salary arrears as at November 2013 Kshs. 56, 822.85; gratuity for 2 years Kshs. 153, 600.00; expenses incurred between January 2014 and June 2014; unpaid amount of passage and baggage Kshs.14, 070.00; and 12 months' salaries compensation for unfair termination.
- b. Costs of the claim.
- c. Interest in (a) above.
- d. Any other relief the court may deem fit.

The respondent filed the response to the claim and counterclaim on 26.04.2016 through Joe Kathungu & Company Advocates. The respondent prayed for judgment against the claimant for:

- a. A sum of Kshs. 612, 773.00 being money allegedly stolen, misappropriated or unaccounted for by Faustin Mbura Nyagah – Deceased, then, the respondent's employee.
- b. Costs and interest of counterclaim.
- c. Any other relief the court may deem fit.

The claimant filed the response to counterclaim on 30.05.2016 and prayed that the counterclaim be struck out and judgment be entered in favour of the claimant as prayed for in the statement of claim.

It is not in dispute that the respondent employed Faustin Mbura Nyagah – Deceased as a cashier Grade

C/D by the letter dated 14.12.2012. The letter stated thus, **“The appointment will be on a one (1) year contract renewable on mutual agreement subject to satisfactory performance but can be terminated by either party giving notice of one (1) month or payment of one month’s salary in lieu of notice.”**

The contract of service was effective 03.12.2012 so that it was ending on or about 03.12.2013. By the letter dated 13.11.2013, the said Faustin Mbura Nyagah – Deceased wrote to the respondent stating that the contract was lapsing on 03.12.2013 and requested for renewal for another one year. He also asked to be paid his gratuity as per the contract that was ending. The contract had stated thus, **“At the end of the contract, you will be paid a gratuity equivalent to 20% of your basic salary. You will also be eligible to thirty (30) annual leave days.”**

By the internal memorandum dated 03.12.2013, the respondent informed the said Faustin Mbura Nyagah – Deceased that an in-depth audit conducted in the cash office by the internal auditors had revealed some irregularities in payment process that may have led to a loss of about Kshs. 436, 823.00 to the respondent. The memorandum invited the said Faustin Mbura Nyagah – Deceased to reply to the allegations within 7 days. He replied by his internal memorandum of 09.12.2013. The defence was that there had been some weak internal control systems leading to some clerical errors in some books of accounts. The reply analysed the particulars of the alleged loss and concluded that out of the reported amount only Kshs.6, 570.00 was unaccounted for. The reply further stated that there was a broad possibility of having paid claims twice due to the numerous I.O.U’s experienced over the past period and hence, the Nakummatt and Maguna-andu issue that had been reported. The reply then ended thus, **“There being no time currently for me to work at the college (contract not renewed) I hope the explanations above will be of great help to the management now and the future in Finance Department. Thanks.”**

The respondent delivered to the claimant a further internal memorandum dated 16.06.2013 stating that the internal audit had revealed more irregularities in the payment process that may have led to a loss totalling Kshs.581, 742.00 to the respondent and the said Faustin Mbura Nyagah – Deceased was invited to reply to the allegations within 7 days. He replied by the internal memorandum of 10.01.2014 (a belated reply in view of the time-line set for the reply). The reply noted that there was an error in the respondent’s memo as it should have been dated 16.12.2013 and not 16.06.2013. He lamented that the audit had been personalised and had targeted him as an individual before forwarding the same to the management as was the routine. Further, the audit queries had made the respondent’s management to treat him as a suspect and thus the management had failed to renew his contract and also to pay the salary for December 2013. He then made particularised remarks on the specific allegations. The reply concluded with a request for payment of the December 2013 salary, contract allowance and guidance on the way forward.

At the close of the hearing, parties were given an opportunity to file written submissions. The respondent filed the submissions on 31.03.2017 but the claimant failed to file the submissions.

The **1<sup>st</sup> issue** for determination is whether the termination of the employment of the said Faustin Mbura Nyagah – Deceased, was unfair. It was submitted for the respondent that parties were in a one year fixed term contract which was ending on 02.12.2013. It was further submitted that the respondent not being under obligation not to renew the contract, the contract lapsed by effluxion of the contractual time. The court agrees with that submission. In any event, in the internal memorandum of 10.01.2014 the employee had expressly stated that the management had decided not to renew his contract. In such circumstances, the court returns that the termination of the contract of employment was not unfair and accordingly the claimant is not entitled to the compensation for unfair termination as prayed for. While making that finding the court further finds that the contract lapsed by 03.12.2013 as the claimant testified that she could not tell the number of days her deceased husband may have worked after 03.12.2013.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other claims for payment. RW testified that the deceased was entitled to salary arrears Kshs.40, 318.00; salary for 2 days worked in December 2013 Kshs.4, 254.00; gratuity Kshs.75, 526.00; passage and baggage allowance Kshs.14, 070.00 making a sum of **Kshs.134, 167.00**. The same had not been paid, as per RW’s testimony, due to the claim of Kshs.796, 241.00 less Kshs. 183, 468.00 that Faustin had paid in refund leaving a balance of

Kshs.612,773.00, the prayer in the counterclaim. It was the testimony by RW that the sum of Kshs. 134, 167.00 be applied as a set off to settle part of the counterclaim.

In view of the evidence by RW and in answer to the 2<sup>nd</sup> issue for determination, the court returns that the claimant is entitled to **Kshs. 134, 167.00**.

The 4<sup>th</sup> issue for determination is whether the respondent is entitled to the counterclaim. RW testified that the audit was done while Faustin was in office. RW testified that there was no evidence that Faustin was involved in the audit process so that during the process Faustin offered no explanations. RW further confirmed that allegations of irregularities were made after the contract had lapsed and Faustin never admitted that he owed the respondent. In view of that evidence the court finds that Faustin could not have deposited Kshs. 183, 468.00 to refund the respondent as was alleged and testified by RW as at time of the deposit, the issue of the alleged irregularities as was levelled against Faustin had not come up at all. RW confirmed that Faustin's duty entailed depositing and withdrawal of cash and the deposit of Kshs. 183, 468.00 would very well have been in the ordinary cause of Faustin's discharge of his usual duty.

The court has considered the material on record. The respondent alleged against Faustin that the said Faustin Mbura Nyagah – Deceased may have occasioned some losses to the respondent through irregular payment. The said Faustin made a comprehensive reply. Unfortunately, the respondent failed to conclude the disciplinary process or investigation through appropriate hearing and the respondent has not advanced any reason why the process was not concluded. Taking the material on record into account, all the evidence available show that allegations were levelled against the said Faustin, Faustin put forward a strong defence, and there was no respondent's finding on the culpability of Faustin. In absence of such finding of culpability, it is difficult for this court to find that the said Faustin Mbura Nyagah – Deceased owed the respondent as was alleged, claimed and prayed for in the counterclaim. Accordingly, the counterclaim will fail.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The respondent to pay the claimant **Kshs. 134, 167.00** by 01.06.2017 failing interest to be payable thereon at court rates from 03.12.2013, the date the contract lapsed, till the date of full payment.
- b. The dismissal of the counterclaim.
- c. The respondent to pay the costs of the suit including the counterclaim.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 5<sup>th</sup> May, 2017**.

**BYRAM ONGAYA**

**JUDGE**